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No. 86-

IN THE

Supreme Court of the United States

October Term, 1985

TEMPLE UNIVERSITY — OF THE COMMONWEALTH SYSTEM OF HIGHER EDUCATION,

Petitioner

v.

UNITED STATES OF AMERICA,

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTIONS PRESENTED

1. Whether legislation which is expressly prospective on its face can nevertheless be made retroactive by a court in order to cure a perceived oversight in drafting.

2. Whether a revenue ruling purporting to interpret legislation passed over twenty-five years earlier overrides the plain language of the legislation, the intent of the enacting Congress, a Treasury Regulation of long standing, and a holding of this Court.

3. Whether a statement in a congressional committee report interpreting legislation enacted over forty years earlier overrides the policies and express intent of the enacting Congress and an interpretation of the law by this Court.

4. Whether the due process clause of the fifth amendment prohibits Congress from enacting retroactive legislation which selectively takes away a taxpayer's vested right to refund of FICA taxes paid more than four years earlier.

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STATUTES AND REGULATIONS INVOLVED

Section 3121(a)(2)(A) of the Internal Revenue Code of 1954, as amended, 26 U.S.C. §3121(a)(2)(A), during the period at issue provided in relevant part:

> (a) Wages. — For purposes of this chapter, the term "wages" means all remuneration for employment, including the cash value of all remuneration paid in any medium other than cash; except that such term shall not include —
>
> * * * * *
>
> (2) the amount of any payment (including any amount paid by an employer for insurance or annuities, or into a fund, to provide for any such payment) made to, or on behalf of, any employee or any of his dependents under a plan or system established by an employer which makes provision for his employees generally (or for his employees generally and their dependents) or for a class or classes of his employees (or for a class or classes of his employees and their dependents), on account of —
>
> (A) retirement,

Section 1426(a)(2) of the Internal Revenue Code of 1939, enacted as part of the Social Security Act Amendments of 1939, P.L. 76-379, 53 Stat. 1360, 1373 (1939), provided in relevant part:

> (a) Wages. — The term "wages" means all remuneration for employment, including the cash value of all remuneration paid in any medium other than cash; except that such term shall not include —
>
> * * * * *
>
> (2) the amount of any payment made to, or on behalf of, an employee under a plan or system established by an employer which makes provision for his employees generally or for a class or classes of his employees (including any amount paid by an employer for insurance or annuities, or into a fund, to provide for any such payment), on account of (A) retirement, or (B) sickness or accident disability, or (C) medical and hospitalization expenses in connection with sickness or accident disability, or (D) death, provided the employee (i) has not the option to receive, instead of provision for such death benefit, any part of such payment, or, if such death benefit is insured, any part of the premiums (or contributions to premiums) paid by his employer, and (ii) has not the right, under the provisions of the plan or system or policy of insurance providing for such death benefit, to assign such benefit, or to receive a cash consideration in lieu of such benefit either upon his withdrawal from the plan or system providing for such benefit or upon termination of such plan or system or policy of insurance or of his employment with such employer.

Section 3121(a)(5)(D)[1] of the Internal Revenue Code of 1954, enacted in Section 324(a)(2) of the Social Security Amendments of 1983, P.L. 98-21, 97 Stat. 65, 122 (1983), provides in relevant part:

> (a) Wages. — For purposes of this chapter, the term "wages" means all remuneration for employment, including the cash value of all remuneration paid in any medium other than cash; except that such term shall not include —
>
> * * * * *
>
> (5) any payment made to, or on behalf of, an employee or his beneficiary —
>
> * * * * *
>
> (E) under or to an annuity contract described in Section 403(b), other than a payment for the purchase of such contract which is made by reason of a salary reduction agreement (whether evidenced by a written instrument or otherwise)

Section 324(d)(1) of the Social Security Amendments of 1983, P.L. 98-21, 97 Stat. 65, 125 (1983), provides:

> Except as otherwise provided in this subsection, the amendments made by this section shall apply to remuneration paid after December 31, 1983.

---

1. Section 3121(a)(5)(D) was enacted in 1983 as Section 3121(a)(5)(E). The 1984 amendments relettered Section 3121(a)(5)(E) as Section 3121(a)(5)(D) because Section 3121(a)(5)(C) was repealed as obsolete. To avoid confusion, the provision will be referred to as Section 3121(a)(5)(D) throughout.

Section 327 of the Social Security Amendments of 1983, P.L. 98-21, 97 Stat. 65, 127 (1983), codified in 26 U.S.C. §3121(a), provides in relevant part:

> (b)(1) Nothing in the regulations prescribed for purposes of chapter 24 (relating to income tax withholding) which provides an exclusion from "wages" as used in such chapter shall be construed to require a similar exclusion from "wages" in the regulations prescribed for purposes of this chapter.
>
> * * * * *
>
> (d)(1) Except as provided in paragraph (2), the amendments made by subsections (a) and (b) shall apply to remuneration paid after December 31, 1983.

Section 2662(g) of the Deficit Reduction Act of 1984, P.L. 98-369, 98 Stat. 494, 1160 (1984), provides in relevant part:

> Section 327(d) of such Amendments (relating to codification of *Rowan* decision with respect to meals and lodging) is amended to read as follows:
>
> * * * * *
>
> (2) The amendments made by subsection (b) and subsection (c)(4) shall apply to remuneration . . . paid after March 4, 1983, and to any such remuneration paid on or before such date which the employer treated as wages when paid.

Treasury Regulation §31.3121(a)(2)-1(d), 26 C.F.R. §31.3121(a)(2)-1(d), provides:

> It is immaterial for purposes of this exclusion whether the amount or possibility of such benefit payments is taken into consideration in fixing the amount of an employee's remuneration or whether such payments are required, expressly or impliedly, by the contract of service.

No. 86-

IN THE

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October Term, 1985

TEMPLE UNIVERSITY — OF THE COMMONWEALTH SYSTEM OF HIGHER EDUCATION,

Petitioner

v.

UNITED STATES OF AMERICA,

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Petitioner, Temple University—Of The Commonwealth System of Higher Education, hereby prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Third Circuit in this matter and in support thereof states the following:

DECISIONS BELOW

The opinion of the District Court, reported at 595 F. Supp. 94 (E.D. Pa. 1984), appears in the Appendix hereto at A26. The opinion of the Court of Appeals, reported at 769 F.2d 126 (3d Cir. 1985), appears in the Appendix hereto at A1.

STATEMENT OF JURISDICTION

The judgment of the Court of Appeals (No. 84-1416) issued on July 22, 1985. A timely motion for rehearing was denied on September 24, 1985. Justice Brennan issued an order granting petitioner until February 21, 1986 to file this petition for certiorari. This Court has jurisdiction under 28 U.S.C. §1254(1).

STATEMENT OF THE CASE

A. THE PARTIES

Petitioner Temple University—Of The Commonwealth System of Higher Education ("Temple") is a non-profit educational organization described in Section 501(c)(3) of the Internal Revenue Code of 1954, as amended (the "Code"), and exempt from Federal income tax under Section 501(a) of the Code.

Respondent is the United States of America.

B. REFUND OF FEDERAL INSURANCE CONTRIBUTION ACT TAXES

On behalf of itself, and its consenting employees, Temple seeks a refund of approximately $690,584[2] in Federal Insurance Contribution Act ("FICA") taxes paid during the years 1979 through 1982, inclusive, in connection with contributions made by Temple for the purchase of Section 403(b) annuities purchased pursuant to salary reduction agreements. Before, during and after the period at issue in this case, Temple maintained a qualified salary reduction retirement annuity plan of the type described in Section 403(b) of the Code. Under the plan, employees entered into salary reduction agreements in which they agreed to stated reductions in their salaries for the purpose of funding the purchase by Temple of annuity contracts on the employees' behalves. In addition to the "salary reduction amounts", Temple made additional contributions for the purchase of Section 403(b) annuities ("salary supplement amounts").

Under Section 403(b) of the Code, the entire amount contributed by Temple, i.e., the salary reduction amount and the salary supplement amount, is excluded from the employee's income for Federal income tax purposes. It is undisputed that no withholding of Federal income tax is required with respect to

2. Temple, and its consenting employees, also seek a refund of approximately $303,607 in FICA taxes paid during 1983. *Temple University—Of The Commonwealth System of Higher Education v. U.S.*, Civil Action No. 85-3708 (E.D. Pa. filed June 27, 1985). If Temple and its employees prevail, they also will be entitled to statutory interest on the refunds.

either the salary reduction or salary supplement amounts. It is also undisputed that no FICA withholding is required with respect to the salary supplement amounts. At issue in Temple's refund case is whether the salary reduction amounts must be treated consistently or whether, as the Government claims, they are subject to FICA tax although not to income tax withholding.

C. STATUTORY AND HISTORICAL BACKGROUND

Section 403(b) excludes from income tax "amounts contributed by such employer for such annuity contract." The Government concedes that this exclusion from income tax applies to both salary reduction and salary supplement amounts. During the period at issue, Section 3121(a)(2)(A), in virtually identical language, excluded from FICA tax "the amount paid by an employer for. . .annuities" on account of retirement. The Treasury Regulations implementing this exclusion specified:

> It is immaterial for purposes of this exclusion whether the amount or possibility of such benefit payments is taken into consideration in fixing the amount of an employee's remuneration or whether such payments are required, expressly or impliedly, by the contract of service.

26 C.F.R. §31.3121(a)(2)-1(d).

The statutory language, eventually codified as Section 3121(a)(2)(A), was originally enacted in 1939. Social Security Act Amendments of 1939, P.L. 76-379, §201, 53 Stat. 1360, 1373 (1939). The language of the Treasury Regulation quoted above was taken almost verbatim from the legislative committee reports. H. Rep. No. 728 76th Cong., lst Sess., *reprinted in* 1939-2 C.B. 538, 548; S. Rep. No. 734, 76th Cong., lst Sess., *reprinted in* 1939-2 C.B. 565, 575.

In Rev. Rul. 53-181, 1953-2 C.B. 111 (A37), the Internal Revenue Service ("the Service") ruled that "the amount paid by an employer exempt from Federal income tax . . . as an insurance premium for the purchase of an annuity contract of the type referred to in [the predecessor statute of Section 403(b)]" did not fall within the definition of "wages" for FICA tax purposes and

was not subject to withholding for either income tax or FICA tax purposes.

In 1965 the Service distinguished Revenue Ruling 53-181 and ruled that while salary supplement amounts were excluded from taxable wages for income tax withholding and FICA tax purposes, salary reduction amounts were excluded from taxable wages for income tax withholding purposes but were *not* excluded from taxable wages for FICA purposes under Section 3121(a)(2). Rev. Rul. 65-208, 1965-2 C.B. 383 (A38). The Service cited no authority, but simply asserted that the income tax and FICA tax provisions served "substantially different" purposes.

In 1981, this Court struck down long-standing Treasury Regulations requiring the inclusion of the value of meals and lodging provided by an employer in the employee's taxable wages for FICA and Federal Unemployment Tax Act ("FUTA") purposes. *Rowan Companies, Inc. v. U.S.*, 452 U.S. 247 (1981).[3] The basis of the decision was the Court's determination that "Congress intended 'wages' to mean the same thing under FICA, FUTA, and income tax withholding." *Id.* at 255. The Court rejected "the view that the different interpretations of the definition of 'wages' are justified by the different purposes of FICA . . ., on the one hand, and income-tax withholding, on the other." *Id.* at 250.

In 1983 Congress amended the FICA statute in two ways relevant to this case. First, Congress overruled the *Rowan* rationale by decoupling the FICA definition of "wages" from the income tax definition of "wages" (the "*Rowan*-decoupler"):[4]

> Nothing in the regulations prescribed for purposes of chapter 24 (relating to income tax withholding) which provides an exclusion from 'wages' as used in such chapter shall be construed to require a similar exclusion from 'wages' in the regulations prescribed for purposes of this chapter.

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3. The value of such meals and lodging is excluded from wages for income tax withholding purposes by virtue of its exclusion from taxable income under Section 119 of the Code.

4. Congress also codified *Rowan*'s specific holding with respect to the exclusion of the value of meals and lodging from FICA tax.

26 U.S.C. §3121(a). Second, Congress repealed Section 3121(a)(2)(A), the FICA wage exclusion for employer payments for employee retirement plans, and added what is now Section 3121(a)(5)(D), which for the first time distinguished salary supplement and salary reduction amounts, excluding the former but not the latter from the FICA wage base.

Both of these changes were made prospective only, being applicable to "remuneration paid after December 31, 1983." Social Security Amendments of 1983, P.L. 98-21, §§324(d)(1), 327(d)(1), 97 Stat. 65, 125, 127 (1983).

Finally, in 1984 Congress amended the effective date of the *Rowan*-decoupler as follows:

> Section 327(d) of such Amendments (relating to codification of *Rowan* decision with respect to meals and lodging) is amended to read as follows:
>
> * * * * *
>
> (2) The amendments made by subsection (b) and subsection (c)(4) shall apply to remuneration . . . paid after March 4, 1983, and to any such remuneration paid on or before such date which the employer treated as wages when paid.

Deficit Reduction Act of 1984, P.L. 98-369, §2662(g), 98 Stat. 494, 1160 (1984). However, Congress did not change the effective date of, or purport to make retroactive, the 1983 amendments which repealed Section 3121(a)(2)(A) and added what is now Section 3121(a)(5)(D).

D. PROCEEDINGS IN THE DISTRICT COURT

Following denial of its refund claim by the District Director of the Internal Revenue Service, Temple brought this action in the United States District Court for the Eastern District of Pennsylvania, invoking jurisdiction under 28 U.S.C. §1346(a)(1), 28 U.S.C. §1331(a), and 28 U.S.C. §1340. Upon cross-motions for summary judgment, and prior to the enactment of the 1984 legislation, the District Court held that the salary reduction amounts were subject to FICA tax. (A26).

E. PROCEEDINGS IN THE COURT OF APPEALS

Upon appeal by Temple, a divided panel of the Court of Appeals affirmed the decision of the District Court, rejecting Temple's two independent bases for relief. Temple had first argued that during the years at issue the plain language of the statute, Section 3121(a)(2)(A), the controlling Treasury Regulation, 26 C.F.R. §31.3121(a)(2)-1(d), and the contemporaneous legislative history of the predecessor statute[5] required the exclusion of the salary reduction amounts from FICA tax. In rejecting these arguments, the majority ignored the plain language of the statute, discounted a controlling Treasury Regulation[6] and gave no weight to the contemporaneous legislative history. Instead, the majority (1) gave controlling weight to a departmental revenue ruling (A5-A6), and to the 98th Congress' view of the meaning of legislation enacted by the 76th Congress (A6), (2) found a "long-standing congressional intent" to treat "wages" differently for FICA and income tax purposes, in direct contradiction to the Supreme Court's findings of congressional intent in *Rowan* (A6-A7), and (3) gave retroactive effect to a 1983 statute expressly prospective on its face on the basis of remarks appearing in a 1984 committee report (A8-A13).

Second, and independently, Temple had argued that *Rowan* controlled the disposition of its case, and that Congress' attempt retroactively to overrule *Rowan* with respect to those taxpayers who had treated remuneration as wages for FICA purposes (i.e., had duly paid taxes in compliance with the Service's published position) was unconstitutional under the due process clause of the fifth amendment. The majority rejected this argument as well, finding that, although the retroactivity argument was "troublesome," the 1984 legislation was constitutional. (A15-A17).

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5. H. Rep. No. 728, 76th Cong., 1st Sess., *reprinted in* 1939-2 C.B. 538, 548; S. Rep. No. 734, 76th Cong., 1st Sess., *reprinted in* 1939-2 C.B. 565, 575.

6. See note 13, *infra* at 14.

REASONS FOR GRANTING THE WRIT

I. INTRODUCTION

Temple's reasons for the granting of this writ embrace two fundamental principles. The first involves separation of powers and the respective roles of Congress, an administrative agency and the courts in matters of statutory interpretation. The second concerns the constitutionality of selectively retroactive taxation.

First, Temple asks this Court to determine (a) that a court, in interpreting the revenue laws, may not usurp Congress' constitutional role by inferring tax liability apparently intended but not enacted by Congress itself; (b) that the plain language of a statute, the intent of the enacting Congress, a Treasury Regulation of long standing, and a holding of this Court take precedence over an unsupported revenue ruling; and (c) that the policies and express intent of an enacting Congress and an interpretation of the law by this Court take precedence over the view of a Congress forty years later as to what the enacting Congress intended. Although these principles are well-established under prior decisions of this Court, the errors of the majority opinion below demonstrate that lower courts continue to require guidance on these fundamental questions of constitutional role.

It would be mistaken, moreover, to view this case in isolation from the current flux in the tax law. The common root of the individual errors made by the majority below lies in the underlying assumption that the judicial role is altered — rewriting statutes with one hand while abdicating to administrative bodies with the other — in a legislative area as heavily regulated and as subject to sudden change as the tax law. The recent rapid and technical changes in the tax law, coupled with the background pressure of the deficit crisis, create conditions that make judicial lapses of the type described herein increasingly likely. This Court must reestablish that neither Congress' failures to enact its presumed intentions, nor the highly technical nature of the tax code, justifies a departure from the judiciary's duty to interpret statutes as written. The issues presented by the instant case are sharply drawn and provide this Court with such an opportunity.

Second, this case raises the constitutional question of whether Congress may single out for liability imposed more than four years subsequent to the taxable event only those taxpayers who filed tax returns in compliance with the published position of the Internal Revenue Service. This Court has never sanctioned retroactive taxation of such extended reach, and the period of retroactivity permissible under previous decisions of this Court remains to be clarified.[7] Even if retroactive taxation of this reach is otherwise constitutionally permissible, the application of such a law solely to persons who paid their taxes in reliance on the pronouncements of the government is manifestly unjust.

This Court should grant certiorari in this case because of its important implications for separation of powers, statutory construction, and the constitutionality of selectively retroactive taxation. Although the law has been changed for future periods, the significance of the issues raised by the majority opinion below transcends the interpretation of the specific statutes here in question. Accordingly, a grant would be appropriate even if Temple were the only taxpayer seeking a refund. However, Temple notes that "a considerable number of suits are pending in the lower courts which will turn on resolution of these issues." *Massachusetts Trustees of Eastern Gas & Fuel Associates v. U.S.*, 377 U.S. 235, 237 (1964). Temple is aware of at least 14 identical refund actions currently pending in the federal courts and 27 schools and hospitals in a pre-litigation posture.[8] The issues are well-defined by the majority and dissenting opinions below. In the interest of judicial economy this Court should grant certiorari to resolve the issues raised.

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7. *See Van Emmerik v. Janklow*, 454 U.S. 1131 (1982) (Justices White and Blackmun dissenting from dismissal of appeal).

8. Temple has included in the Appendix at A41 a list of the 14 pending cases of which it is aware, the citation to a Second Circuit case which has been withdrawn without prejudice subject to reinstatement by the Plaintiff-Appellant within 60 days after this Court's final decision in the instant case, and a list of 27 schools and hospitals which have live refund claims, some of which are pending with the Service or are on extension with the Social Security Administration and some of which have been denied at the administrative level, but are still within the two-year period for filing in court.

II. THIS COURT SHOULD GRANT CERTIORARI TO RE-ESTABLISH THAT A COURT MAY NOT GIVE RETROACTIVE EFFECT TO EXPRESSLY PROSPECTIVE LEGISLATION IN ORDER TO FULFILL A CONGRESSIONAL INTENTION THAT CONGRESS ITSELF FAILED TO EFFECTUATE.

The majority below held that the 1983 amendments to Section 3121(a)(2)(A) "should be seen as having retroactive application." (A8). The court explicitly recognized (1) that, as enacted in 1983, both the *Rowan*-decoupler and the replacement of Section 3121(a)(2)(A) by what is now Section 3121(a)(5)(D) applied only prospectively and (2) that the 1984 amendments purported to make *only* the *Rowan*-decoupler retroactive. Nonetheless, the majority held that the clear congressional intention to ban refunds of the type here at issue, as expressed in a 1984 House Committee Report, provided an adequate basis for giving retroactive effect to Section 3121(a)(5)(D), "despite Congress' failure explicitly to provide for retroactivity." (A12).

In thus attempting to cure this perceived drafting oversight, the court overstepped the bounds of its constitutional authority and placed itself in direct conflict with this Court's decision in *Iselin v. U.S.*, 270 U.S. 245 (1926). In *Iselin* the Court considered the Government's request to extend a tax statute to cover a case intended to be covered but inadvertently omitted by Congress.[9] Responding to the argument that the Court should give effect to Congress' intention over the express language of the statute, Justice Brandeis stated, "What the Government asks is not a construction of a statute, but, in effect, an enlargement of it by the court, so that what was omitted, presumably by inadvertence, may be included within its scope. To supply omissions transcends the judicial function." *Id.* at 251.

Similarly, in the instant case, it may be assumed that Congress intended in 1984 to cut off refund actions of the type here

9. The majority's attempt to distinguish *Iselin* on the basis that in that case there was no "clearly expressed legislative intention" is erroneous. (A12). The Court "assumed that Congress did not purpose to exempt from taxation this class of tickets." *Iselin*, 270 U.S. at 250.

at issue. However, only Congress has the authority to give statutory expression to its intended legislative ends. It is not the courts' role to supply omitted terms. Where the means chosen by Congress are inadequate or ineffective in achieving its purpose, the solution lies with Congress alone. "Laws enacted with good intention, when put to the test, frequently, and to the surprise of the lawmaker himself, turn out to be mischievous, absurd or otherwise objectionable. But in such a case the remedy lies with the law making authority, and not with the courts." *Crooks v. Harrelson*, 282 U.S. 55, 60 (1930). There is no authority for carving out an exception to this rule for tax legislation.

Recent years have seen the enactment of amendments to the tax laws of increasing scope and complexity.[10] These have subsequently required special acts devoted to "technical corrections" that rival the original acts in scale. In this context, Justice Frankfurter's warning against "judicial draftsmanship" is particularly apposite:

> [W]hat courts do with legislation may in turn deeply affect what Congress will do in the future. Emerson says somewhere that mankind is as lazy as it dares to be. Loose judicial reading makes for loose legislative writing. It encourages the practices illustrated in a recent cartoon in which a senator tells his colleagues "I admit this new bill is too complicated to understand. We'll just have to pass it and find out what it means."

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10. *See, e.g.*, Amendments to the Internal Revenue Code of 1954, P.L. 96-601, 94 Stat. 3495 (1980); Simplification of Private Foundation Return and Reporting Requirements, P.L. 96-603, 94 Stat. 3503 (1980); Installment Sales Revision Act of 1980, P.L. 96-471, 94 Stat. 2247 (1980); Crude Oil Windfall Profit Tax Act of 1980, P.L. 96-223, 94 Stat. 229 (1980); Economic Recovery Tax Act of 1981, P.L. 97-34, 95 Stat. 172 (1981); Technical Corrections Act of 1982, P.L. 97-448, 96 Stat. 2635 (1982); Tax Equity and Fiscal Responsibility Act of 1982, P.L. 97-248, 96 Stat. 324 (1982); Subchapter S Revision Act of 1982, P.L. 97-354, 96 Stat. 1669 (1982); Miscellaneous Revenue Act of 1982, P.L. 97-362, 96 Stat. 1726 (1982); Amendments to the Internal Revenue Code, P.L. 97-473, 96 Stat. 2605 (1983); Amendments to the Internal Revenue Code of 1954 and Social Security Act, P.L. 97-455, 96 Stat. 2497 (1983); Deficit Reduction Act of 1984, P.L. 98-369, 98 Stat. 494 (1984); Retirement Equity Act of 1984, P.L. 98-397, 98 Stat. 1426 (1984).

Frankfurter, "Some Reflections on the Reading of Statutes," 47 Colum. L. Rev. 527, 545 (1947). This Court should grant certiorari to reaffirm that "legislation by committee report" is no more acceptable in the tax area than in any other legislative field.

III. THIS COURT SHOULD GRANT CERTIORARI (A) TO RESOLVE A CONFLICT IN THE CIRCUITS REGARDING THE PRECEDENTIAL WEIGHT OF REVENUE RULINGS AND (B) TO REESTABLISH THAT THE PLAIN LANGUAGE OF A STATUTE, THE INTENT OF THE ENACTING CONGRESS, A TREASURY REGULATION, AND A HOLDING OF THIS COURT TAKE PRECEDENCE OVER AN UNSUPPORTED REVENUE RULING AND THE VIEW OF A CURRENT CONGRESS AS TO WHAT AN ENACTING CONGRESS INTENDED OVER FORTY YEARS EARLIER.

Although relying principally on Congress' intention in 1984 to bar refunds of the type at issue (see Part II, *supra*), the majority below also held that Section 3121(a)(2)(A) never applied to salary reduction amounts. In support of this construction of the 1939 statute, the court cited just two authorities: a 1965 revenue ruling and language from committee reports accompanying the 1983 amending legislation. Neither provides credible authority for the court's holding.

A. The Majority Opinion Creates a Conflict in the Circuits by Giving Controlling Weight to an Unsupported Revenue Ruling Contrary to the Plain Language of the Statute, the Intent of the Enacting Congress, a Treasury Regulation, a Prior Revenue Ruling, and a Holding of This Court.

The majority states that "the Government's position is directly supported by Rev. Rul. 65-208, 1965-2 C.B. 383, and its consistent application since its adoption in 1965." (A5). But as Judge Weis points out in his dissent, "[a] revenue ruling is simply the opinion of the Service's legal counsel which has not received the approval of the Secretary nor of Congress. A ruling is

not a regulation and does not bind the IRS." (A21). The Commissioner may revoke revenue rulings, retroactively or prospectively, at will. 26 U.S.C. §7805. The Service itself warns taxpayers that revenue rulings merely show "the trend of official opinion" in the administration of the tax laws and that they commit the Service to no particular interpretation of the law. (A20). Furthermore, Revenue Ruling 65-208 cited no authority for its interpretation. In short, "the ruling was neither 'controlling' nor 'authority'." (A20).[11]

This unprecedented grant of authority to a revenue ruling creates a direct conflict with other circuits as to the weight due a revenue ruling. *See, e.g., U.S. v. Bennett*, 186 F.2d 407, 410 (5th Cir. 1951) (Rulings are "made to order for the Commissioner by his legal staff, and [have] no more binding or legal force than the opinion of any other lawyer."); *Sims v. U.S.*, 252 F.2d 434, 438 (4th Cir. 1958), *aff'd*, 359 U.S. 108 (1959).

Such undue authority granted a revenue ruling also is in direct conflict with the teachings of this Court. The Court has admonished on numerous occasions that "departmental rulings not promulgated by the Secretary are of little aid in interpreting a tax statute." *Biddle v. Commissioner*, 302 U.S. 573, 582 (1938). *See also, Dixon v. U.S.*, 381 U.S. 68, 74 (1965); *Helvering v. N.Y. Trust Co.*, 292 U.S. 455, 468 (1934).

The weight granted Revenue Ruling 65-208 also is disturbing in view of the overwhelming contrary authority the majority chose to distinguish or ignore. Section 3121(a)(2)(A) on its face made no distinction between salary supplement and salary re-

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11. The court's reference to the ruling's "consistent application" since 1965 provides no better support for the holding. Congress' 1939 exclusion of payments for retirement plans from the FICA definition of "wages" was not amended until 1983, so no Congressional acquiescence in the ruling may be inferred for the years at issue. More significantly, in *Rowan* this Court did not hesitate to strike down duly issued Treasury Regulations of forty years' vintage despite a claim of congressional reenactment of the relevant statutory provisions, where the regulation was in conflict with Congress' original statutory intention.

duction amounts.[12] The controlling Treasury Regulation specifies that "[i]t is immaterial for purposes of this exclusion whether the amount or possibility of such benefit payments is taken into consideration in fixing the amount of an employee's remuneration."[13] 26 C.F.R. §31.3121(a)(2)-1(d). Near-identical language appears in the House and Senate Committee Reports accompanying the original enactment of the exclusion. *See* note 5 at 7. As indicated in Judge Weis' dissent, Revenue Ruling 65-208 is inconsistent with Congress' express desire to encourage such annuity retirement plans by reducing the employer's tax costs (A22), and with an earlier ruling, Revenue Ruling 53-181, 1953-2 C.B. 111. Finally, the sole basis offered by Revenue Ruling 65-208 for its position, i.e., the "substantially different" purposes served by income and FICA withholding tax, is precisely the interpretation of Congress' intent that this Court rejected in *Rowan*. The majority in effect gave precedential weight to a revenue ruling over a decision of this Court.

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12. There is persuasive evidence from the history of Section 3121(a)(2)(A) that no distinction between salary supplement and salary reduction amounts was intended. In Section 1426(a)(2) of the 1939 Code, the predecessor to Section 3121(a)(2), Congress drew that precise distinction in the case of death benefits. By necessary implication, Congress' failure to draw the distinction for retirement plans cannot be viewed as inadvertent.

13. The majority "distinguished" this regulation by accepting, with neither discussion nor citation, the Government's assertion that the quoted language refers only to employee retirement benefits under a collective bargaining agreement. (A8). The court's sole basis for this interpretation is a totally unsupported statement in a footnote in the Government's brief in the Court of Appeals that the quoted language "appears to reflect not an explicit salary reduction agreement, but rather the inclusion of employee retirement benefits as a part of a package of wages and benefits in a collective bargaining agreement." (Brief for the Appellee at 19 n. 4).

B. The Majority Opinion Gives Controlling Weight to the View of a Current Congress as to a Prior Congress' Intent Over a Contrary Interpretation of the Law by This Court and the Express Intent of the Prior Congress.

The majority below found support for the position articulated by Revenue Ruling 65-208 in the legislative reports accompanying the Social Security Amendments of 1983. It determined that the 98th Congress understood Revenue Ruling 65-208 to reflect the current state of the law. The majority stated: "That Congress saw Rev. Rul. 65-208 as the properly applicable law during the period in question is suggested by statements made in the legislative history of the Social Security Amendments of 1983." (A6). Even if it were conceded that the 98th Congress thought Revenue Ruling 65-208 represented controlling law, this belief is of little consequence.[14] It is the understanding of the enacting Congress, not a subsequent Congress, that controls a court's construction of legislation.[15] *U.S. v. Vogel Fertilizer Co.*, 455 U.S. 16, 34 (1982); *United Air Lines, Inc. v. McMann*, 434 U.S. 192, 200 n. 7 (1977); *International Brotherhood of Teamsters v. U.S.*, 431 U.S. 324, 354 n. 39 (1977). The legislative reports accompanying the original enactment of Section 3121(a)(2)(A) demonstrate the 76th Congress' intention to exclude salary reduction amounts from FICA taxation. *See*, H. Rep. No. 728, 76th Cong., 1st Sess., *reprinted in* 1939-2 C.B.

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14. Ironically, the Conference Report to the 1983 legislation conceded that, under prior law, contributions made for the purchase of tax-sheltered annuities were excluded from the FICA wage base even when funded through a salary reduction agreement:

> Subject to certain limitations, amounts paid by the employer for the purchase of a tax-sheltered annuity for an eligible employee are excluded from the employee's taxable income and social security wage base. Tax-sheltered annuities may be purchased for employees of educational institutions and certain tax-exempt organizations. Tax-sheltered annuities may be purchased pursuant to a salary reduction agreement.

H.R. Rep. No. 98-47, 98th Cong., 1st Sess. 146, *reprinted in* U.S. CODE CONG. & AD. NEWS 436.

15. This is particularly true where, as here, forty years separated the two Congresses and there was no overlap in membership.

538, 548; S. Rep. No. 734, 76th Cong., 1st Sess. *reprinted in* 1939-2 C.B. 565, 575.

In any event, the intent of the 76th Congress was not open to interpretation by either the 98th Congress or the court below. This Court in *Rowan* authoritatively construed the 1939 legislation and held explicitly that "wages" had the same meaning for FICA and income tax withholding purposes.[16]

Accordingly, this Court should grant certiorari to resolve the conflict in the circuits and to reestablish the proper roles of courts, Congress, and Internal Revenue Service in the administration of the tax laws.

IV. THIS COURT SHOULD GRANT CERTIORARI TO DECIDE THE PERMISSIBLE REACH OF STATUTES IMPOSING RETROACTIVE TAX LIABILITY.

Temple's alternative argument based on *Rowan* was completely independent of its argument based on Section 3121(a)(2)(A). In 1984, Congress made the *Rowan*-decoupler retroactive for all previous periods. In this case, it was applied to events that occurred more than four years earlier. The court below recognized that Temple must prevail unless the retroactive effect of the *Rowan*-decoupler was constitutional. (A14).

This Court has yet to rule on the constitutionality of retroactive taxation of such extended reach. While it is clear that Congress may tax transactions occurring in the calendar year of enactment, *U.S. v. Darusmont*, 449 U.S. 292 (1981), the validity of retroactive taxation of greater extent remains questionable. *Welch v. Henry*, 305 U.S. 134, 148, *reh'g denied*, 305 U.S. 675 (1938). As recognized by Justice White in his dissent from a dismissal of appeal in *Van Emmerik v. Janklow*, 454 U.S. 1131

16. The fallacy of using subsequent legislative events as an authoritative guide to construing the intent of an earlier Congress is well illustrated by the majority's finding that the 1983 legislative history reflected "the long-standing congressional intent to restrict the forms of compensation excluded from the FICA wage base." (A6). The majority ascribes to the drafters of the 1939 law 1983 FICA concerns and policies that did not exist and could not have existed in 1939. *See* Judge Weis' dissent (A22).

(1982) (joined by Justice Blackmun), "the Courts' prior cases fail to furnish adequate guidance." *Id.* at 1134. The majority below found the retroactivity of the 1984 amendments "troublesome." (A15).

Particularly "troublesome" is the fact that the 1984 legislation overruled *Rowan* on a selectively retroactive basis. The *Rowan*-decoupler was made retroactive only with respect to "any remuneration paid . . . which the employer treated as wages when paid." Deficit Reduction Act of 1984, P.L. 98-369, §2662(g), 98 Stat. 494, 1160 (1984). In other words, only those employers who paid FICA taxes on payments excluded from the FICA definition of "wages" under *Rowan*, and who were thus in a refund posture, are affected by the law. Those who did not pay taxes on these amounts, i.e., those who, whether fraudulently, negligently, or otherwise, failed to obey Revenue Ruling 65-208, are not taxed. Thus, Section 2662 conditions tax liability on disregard for what the Internal Revenue Service claimed was the law.[17]

This Court has recently docketed an appeal in a case involving retroactive taxation. *Hemme v. U.S.*, No. 83-5069 (S.D. Ill. Jan. 23, 1985), *appeal docketed* No. 85-132 (July 22, 1985). Unlike *Temple*, *Hemme* involves only a brief period of retroactivity reaching back to the date the tax bill was voted out of the Conference Committee. While the limited retroactivity involved in *Hemme* may be justified by the prevention of tax avoidance, no such consideration can justify the retroactive legislation at issue in this case. Thus, a decision in *Hemme* cannot provide any guidance to lower courts confronted with longer-term retroac-

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17. The majority below attempts to dismiss the selectivity of the 1984 legislation on the basis that the legislative history of the act "expressly disclaims any intent to validate failures to withhold FICA taxes" and that "the Government . . . conceivably could sue the non-complying employers and recover from them the additional taxes due." (A14). However, because the *Rowan*-decoupler was not made retroactive as to such taxpayers, *Rowan* would constitute the controlling law and the Government could not conceivably recover the taxes allegedly due.

tive legislation of the type here at issue.[18] The instant case presents the Court with the opportunity to clarify this murky area of the law. Accordingly, this Court should grant certiorari and consider this case in conjunction with or following the disposition of *Hemme*.

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18. The provision challenged here was not the only retroactive tax enacted in 1984. The 1984 legislation also selectively imposes retroactive Federal estate tax on Federal Housing bonds upon which taxes were paid. Deficit Reduction Act of 1984, P.L. 98-369, §641, 98 Stat. 494, 939 (1984). These bonds were held to be exempt from estate tax under prior law in *Haffner v. U.S.*, 585 F. Supp. 354 (N.D. Ill. 1984), *aff'd*, 757 F.2d 920 (7th Cir. 1985).

CONCLUSION

For the foregoing reasons, a writ of certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the Third Circuit.

Respectfully submitted,

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APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 84-1416

TEMPLE UNIVERSITY — Of the Commonwealth System of Higher Education,

Appellant

v.

UNITED STATES OF AMERICA

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA
D.C. Docket No. 83-5549

Argued April 29, 1985
Before: SEITZ, WEIS, and
ROSENN, *Circuit Judges*
(Opinion Filed July 22, 1985)

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OPINION OF THE COURT

ROSENN, *Circuit Judge*.

This appeal presents the narrow but difficult question of whether taxpayers are exempt from Federal Insurance Contributions Act (FICA) taxation on amounts paid prior to January 1, 1984, pursuant to salary reduction agreements, for the purchase of retirement annuities qualifying for income tax deferral. The issue arises in connection with a refund suit instituted by the taxpayer, Temple University, to recover $690,584.07 in FICA taxes paid during the taxable years 1979 through 1982, inclusive, on monies which its employees had agreed to apply to the purchase of retirement annuities qualifying for income tax deferral under 26 U.S.C. § 403(b). The district court, finding neither statutory nor judicial support for plaintiff's position, held that plaintiff was not entitled to a refund. We affirm.

I.

The facts of this case are not in dispute. The plaintiff is an institution of higher education and part of the Commonwealth System of Higher Education of Pennsylvania. It is organized and operated as a nonprofit corporation and is exempt from federal

income tax under section 501(a) and section 501(c)(3) of the Internal Revenue Code. 26 U.S.C. §§ 501(a), (c)(3). As an organization described in section 501(c)(3), the plaintiff established an annuity plan for its employees under section 403(b) of the Code.[1] 26 U.S.C. § 403(b). The plan operated throughout the taxable years involved in this case. Under the plaintiff's plan, employees desiring to purchase nonforfeitable, nontransferable retirement annuity contracts agreed to accept a salary reduction amounting to a specified percentage of their compensation. These deductions were then applied, along with supplemental contributions from the employer, to the purchase of the retirement annuities. An employee could execute only one such agreement in any year. Each agreement, legally binding and irrevocable, applied only to compensation earned after its effective date and during its term.

During the taxable years involved in this case, 1979 through 1982, inclusive, the plaintiff included the deductions from its employees' pay under these salary reduction agreements in computing the amount of their "wages" for purposes of the payroll tax under FICA. Plaintiff paid the FICA taxes on the amounts so withheld. This construction of the withholding requirement conformed to Rev. Rul. 65-208, 1965-2 C.B. 383, which required the inclusion of amounts withheld pursuant to a salary reduction agreement in the employee's taxable wage base for purposes of the FICA tax, even though the amounts so withheld were excluded from the employee's federal taxable income pursuant to section 403(b) of the Code.

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1. 26 U.S.C. § 403(b) permits § 501(c)(3) organizations (certain nonprofit corporations operated exclusively for religious, charitable, and educational purposes, etc.) or public schools to contribute toward a retirement annuity for employees without the imposition of a tax at the time of contribution even in the absence of a qualified plan. Amounts contributed are excludable from the gross income of the employee to the extent of the applicable "exclusion allowance," generally 20 percent of his includable income multiplied by the number of years of service and diminished by employer contributions for annuity contacts which were excluded in any prior taxable year. The employee must, in the year of receipt, include in his gross income the amount ultimately received under the annuity contract.

On June 8, 1981, the Supreme Court decided *Rowan Companies v. United States*, 452 U.S. 247 (1981). In *Rowan*, the Court held that "wages" must be consistently interpreted for income tax withholding and FICA purposes. *Id.* at 263. Subsequent to the *Rowan* decision, the plaintiff filed timely claims for refund of the employer taxes it paid based on the salary reduction amounts held includable in the FICA wage base under Rev. Rul. 65-208. The plaintiff also sought a refund of the taxes paid in behalf of its employees and withheld from their wages. The Commissioner rejected completely the plaintiff's claims for refund and the plaintiff thereupon timely filed this suit. Both parties moved for summary judgment.

The district court granted the Government's motion for summary judgment. The court held that Rev. Rul. 65-208 correctly construed the relevant statutory provisions and that it comported with congressional policies against permitting individuals to control the portion of their compensation which was to be included in the Social Security FICA wage base. It rejected the plaintiff's contention that the decision of the Supreme Court in *Rowan* required that the salary reduction amounts involved in this case be treated consistently for income tax and FICA purposes. The court concluded that such salary reductions were not excluded from the FICA wage base merely because they were excluded from taxable income for income tax purposes under section 403(b), noting that in subsequent legislation Congress had codified the rule embodied in Rev. Rul. 65-208. "Congress," stated the district court, "[has] specifically rejected the language in *Rowan*." From this adverse judgment, Temple University appeals.

II.

The inclusion of salary reductions, made for the purchase of retirement annuities, in the taxable wage base for purposes of levying FICA taxes presents a question of law that is fully reviewable on appeal. *Cf. Struble v. New Jersey Brewery Employees' Welfare Trust Fund*, 732 F.2d 325, 330 (3d Cir. 1984) ("Our

review of the district court's grant of summary judgment is plenary.").

Plaintiff relies on two independent and distinct grounds in support of its position that the salary reductions contributed by plaintiff for the purchase of retirement annuities for its employees were not subject to FICA tax. Its principal reason is that during the years at issue, section 3121(a)(2) of the Code statutorily exempted such salary reductions from tax. The alternative basis is that the Supreme Court's 1981 decision in *Rowan* requires, in the absence of express congressional intent to the contrary, that both the income tax and FICA tax provisions be similarly interpreted. We consider each of these grounds in turn.

A.

Section 3121(a) of the Code, 26 U.S.C. § 3121(a), defines "wages" subject to FICA taxes. This section, as applicable to amounts paid prior to January 1, 1984, *excluded* from the definition of "wages":

> the amount of any payment (including any amount paid by an employer for insurance or annuities, or into a fund, to provide for any such payment) made to, or on behalf of, an employee or any of his dependents under a plan or system established by an employer which makes provision for his employees generally . . . on account of—
>
> (A) retirement . . . .

26 U.S.C. § 3121(a)(2). Plaintiff argues that this exclusion covers both the salary reductions and the salary supplements. The Government, on the other hand, takes the position that only the salary "supplements" are excluded, and this case involves a salary *reduction* agreement.

The Government's position is directly supported by Rev. Rul. 65-208, 1965-2 C.B. 383, and its consistent application since its adoption in 1965. In this revenue ruling, the Internal Revenue Service has taken the position that amounts withheld pursuant to a salary reduction agreement are includable in the employee's taxable wage base for FICA tax purposes, even

though the sums so withheld are excluded from the employee's federal taxable income pursuant to section 403(b) of the Code. That Congress saw Rev. Rul. 65-208 as the properly applicable law during the period in question is suggested by statements made in the legislative history of the Social Security Amendments of 1983 (the "1983 Act"), Pub. L. No. 98-21, 97 Stat. 65. In relevant part, this Act explicitly incorporated Rev. Rul. 65-208 into the Code.[2] Congress, in amending the law in this manner, saw itself merely codifying the prior law as articulated in Rev. Rul. 65-208. This is seen in the senate committee report:

> The bill also provides that any amounts paid by an employer to a tax-sheltered annuity by reason of a salary reduction agreement between the employer and the employee would be includible in the employee's social security wage base. *The committee intended that the provision would merely codify the holding of Revenue Ruling 65-208, 1965-2 Cum. Bull. 383* . . . .

S. Rep. No. 23, 98th Cong., 1st Sess. 41, *reprinted in* 1983 U.S. Code Cong. & Ad. News 143, 182 (emphasis added).

Moreover, the legislative history of the 1983 Act also reflects the long-standing congressional intent to restrict the forms of compensation excluded from the FICA wage base. As stated in the senate report;

> Under cash or deferred arrangements, certain tax-sheltered annuities, certain cafeteria plans, and eligible State deferred compensation plans, the employer contributes funds which are set aside by individual employees for individual savings arrangements, and thus, the committee believes that such employer contributions should be included in the FICA base, as is the case for IRA contributions. Otherwise, individuals could, in effect, control which portion of their compensation was to be included in the social security wage base. This would make the system partially elective and would undermine the FICA tax base.

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2. As will be discussed later, *see infra*, the Act also overruled the broad holding of the *Rowan* decision.

Id. at 40. This report further supports the position that Congress, in the 1983 Act, was merely attempting to codify the pre-*Rowan* law, embodied in Rev. Rul. 65-208.

Common sense also supports the pre-*Rowan* applicability of Rev. Rul. 65-208, and the resulting conclusion that section 3121(a) of the Code applied only to the salary supplements. FICA taxes fund a national system of social insurance that supports important and extensive social security and medicare health programs. The purpose and use of FICA funds, then, differ markedly from the objectives underlying the federal income tax system. As stated by the Senate:

> The social security program aims to replace the income of beneficiaries when that income is reduced on account of retirement and disability. Thus, the amount of "wages" is the measure used both to define income which should be replaced and to compute FICA tax liability. Since the security system has objectives which are significantly different from the objective underlying the income tax withholding rules, the committee believes that amounts exempt from income tax withholding should not be exempt from FICA unless Congress provides an explicit FICA tax exclusion.

Id. at 42. Congress has provided no explicit FICA tas exclusion for the salary reduction amounts at issue here. Thus, there is ample justification for Rev. Rul. 65-208's differing treatment of such deductions for purposes of FICA on the one hand and federal income tax on the other.

The plaintiff presents several grounds, independent of *Rowan*, for challenging the rule established in Rev. Rul. 65-208. For example, the plaintiff relies on Treas. Reg. §31.3121(a)(2)-1(d) which provides:

> It is immaterial for purposes of this exclusion [from FICA tax of contributions made by an employer on behalf of an employee pursuant to a retirement plan] whether the amount or possibility of such benefit payments is taken into

> consideration in fixing the amount of an employee's remuneration or whether such payments are required, expressly or impliedly, by the contract of service.

The Government counters by arguing that this regulation reflects not an explicit salary reduction agreement, but rather the treatment of employee retirement benefits in a collective bargaining agreement. Benefits paid by employers under collective bargaining agreements are not treated as paid under salary reduction agreements within the meaning of Rev. Rul. 65-208. Hence, they are not regarded as part of the taxable wage base of the employees for FICA purposes. The plaintiff also relies on Rev. Rul. 181, 1953-2 C.B. 111. This revenue ruling, however, was specifically distinguished in Rev. Rul. 65-208 on the ground that the employer made the contribution involved from its own funds and not under a salary reduction plan.

Even if the foregoing analysis were rejected, and section 3121(a) is seen as applicable to salary reductions, the result is the same. This is due to the amendments found in the 1983 Act — amendments that, in the event the plaintiff's position regarding section 3121(a) has merit, should be seen as having retroactive application. The 1983 Act contained numerous provisions concerning FICA coverage and taxation. Some of the amendments were enacted in reaction to the Supreme Court's *Rowan* decision. Congress, in section 327(b)(1) of the 1983 Act, Pub. L. No. 98-21, §327(b)(1), 97 Stat. 65, 127, sought to extricate the Treasury from the requirement that the definition of "wages" or FICA purposes be interpreted in the same manner as the definition of "wages" for income tax withholding purposes. The "decoupling" provision of the 1983 Act reads as follows:

> Nothing in the regulations prescribed for purposes of chapter 24 (relating to income tax withholding) which provides an exclusion from "wages" as used in such chapter shall be construed to require a similar exclusion from "wages" in the regulations prescribed for purposes of this chapter.

Section 327(b)(1) of the 1983 Act (codification is found following §3121(a)(20) of the Code).

The 1983 Act also amended the section 3121 definition of "wages" for FICA purposes in a number of very *specific* respects. First, Congress amended section 3121(a)(2) by striking "(A) retirement" plans from the list of exclusions under that provision. *See* section 324(a)(3)(A) of the 1983 Act. Second, Congress also struck section 3121(a)(3), relating to the exclusion for non-plan retirement arrangements. *See id.* at section 324(a)(3)(B). Congress then added a new section, 3121(a)(5)(E), which provides that the FICA wage base excludes:

> any payment made to, or on behalf of, an employee or his beneficiary . . . under or to an annuity contract described in section 403(b), *other than* a payment for the purchase of such contract which is made by reason of a *salary reduction* agreement (whether evidenced by a written instrument or otherwise).

Id. at section 324(a)(2)(C) of the 1983 Act (emphasis added) (now codified at 26 U.S.C. §3121(a)(5)(D)).

The specific amendments concerning section 3121 effectively codify Rev. Rul. 65-208. If applicable, these alterations defeat plaintiff's statutory argument. The 1983 Act, however, stated that these amendments to section 3121 (as well as the *Rowan* decoupling provision) were to be effective only for remuneration paid after December 31, 1983. *See* sections 324(d)(1) & 327(d)(1) of the 1983 Act. Thus, by applying the amendments prospectively, the 1983 Act does not, by itself, affect the years involved in this suit.[3]

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3. The failure in either the 1983 or 1984 legislation explicitly to apply the specific section 3121(a) amendments retroactively supports, once again, the notion that Rev. Rul. 65-208, which Congress purported to codify, was seen by Congress as the applicable law prior to *Rowan*. That is, the *Rowan* "decoupling" provision, which was in 1984 explicitly made retroactive, was apparently seen by Congress as sufficient to make the law applicable to the *Rowan* years consistent with the present statutory scheme — a scheme based upon Rev. Rul. 65-208. Apparently, Congress believed that retroactive application of the codification was simply unnecessary because the revenue ruling

In 1984, however, Congress addressed the question of retroactivity. Specifically, section 2662(g) of the Deficit Reduction Act of 1984 (the "1984 Act"), Pub. L. No. 98-369, §2662(g) 98 Stat. 494, 1160, amends the 1983 Act by changing the effective date of the Rowan decoupling provision as follows:

> Section 327(d) of such amendments . . . is amended to read as follows:
>
> * * *
>
> "(2) The amendments made by subsection (b) and subsection (c)(4) shall apply to remuneration . . . paid after March 4, 1983, *and to any such remuneration paid on or before such date which the employer treated as wages when paid*."

Id. (emphasis added). By making the change retroactive, there can be no doubt that Congress intended to cut off *all* claims to refunds based on the rationale of *Rowan*, i.e., that "wages" for FICA purposes are presumptively the same as "wages" for income tax withholding purposes.

Plaintiff, however, considers significant Congress' failure also to explicitly make the specific amendments to section 3121, which effectively codify Rev. Rul. 65-208, retroactive. "It is . . . clear," argues the plaintiff, "that Congress did not retroactively extinguish the right to refund based on section 3121(a)(2)." However, the following statement in the legislative history of the 1984 Act demonstrates that Congress clearly intended to bar the type of refund sought by the plaintiff here:

> The provision in the [Social Security] Amendments applies to remuneration paid after December 31, 1983, for FICA and social security benefit purposes and to remuneration paid after December 31, 1984, for FUTA purposes. Thus, it is possible that this provision could be cited as demonstrating congressional intent that the reasoning of the

NOTES *(Continued)*

already controlled once *Rowan* was removed. The following discussion regarding the retroactivity of the specific section 3121 amendments, then, has relevance only if it is assumed that Congress saw the earlier section 3121(a) as the plaintiff does and desired to *change* the law. As already noted, we do not accept the plaintiff's interpretation.

Rowan decision should generally apply before these dates to types of remuneration other than meals and lodging excluded under section 119, e.g., to contributions under a salary reduction agreement to tax-sheltered annuities (sec. 403(b)). These contributions have been held by the Treasury Department to be taxable for FICA purposes (Revenue Ruling 65-208) even though they are exempt by regulation from income tax withholding. If the 1965 revenue ruling were determined to be invalid, then employers and employees would be eligible for tax refunds for open years because taxable wages would be lower. In addition, wages for benefit computation purposes would be reduced, leading in some cases to reduction of social security benefits being paid to current beneficiaries and recoupment of a portion of benefits which have been paid in recent years on the basis of wage records which included the salary reduction contributions.

Explanation of Provision

In order to avoid the inferences which this provision could raise, the bill clarifies the effective date of the provision overriding the *Rowan* decision so that the provision applies for all purposes, other than the treatment of certain employer-provided meals and lodging, both to remuneration paid after March 4, 1983, and to remuneration paid on or before March 4, 1983, which the employer treated as wages when paid. For example, if an employer treated as wages, for FICA of FUTA taxes (or both), the amounts contributed during 1982 to an employee's tax-sheltered annuity pursuant to a salary reduction agreement, the FICA or FUTA taxes (as the case may be) paid by the employer and employee may not be refunded or credited. The committee intends no inference as to the treatment of amounts paid on or before March 4, 1983, which the employer did not treat as wages when paid.

H.R. Rep. No. 432, 98th Cong., 1st Sess. 1658, *reprinted in* 1984 U.S. Code Cong. & Ad. News 697, 1280-81 (footnote omitted).

Faced with this clear congressional purpose to ban refunds in this type of case, the question becomes whether this intent can be implemented, assuming this is necessary, *see supra* note 3, despite Congress' failure explicitly to provide for retroactivity. Plaintiff stresses the actual failure of Congress, through inadvertence or otherwise, to make the specific section 3121 amendments retroactive and argues that the changes should, on the basis of this failure, not be seen as applying to this case. In support of its position, plaintiff cites *Iselin v. United States*, 270 U.S. 245 (1926). In *Iselin*, the Supreme Court, through Justice Brandeis, stated that "[w]hat the Government asks is not a construction of a statute, but, in effect, an enlargement of it by the court, so that what was omitted, presumably by inadvertence, may be included within its scope. To supply omissions transcends the judicial function." *Id.* at 251.

It is generally true that courts should look to the plain language of, and not rewrite, statutes. *See, e.g., id.*; *Tracy Leigh Development Corp. v. Government of the Virgin Islands*, 501 F.2d 439, 442 (3d Cir. 1974) (relying on Frankfurter, *Some Reflections on the Reading of Statutes*, 47 Colum. L. Rev. 527 (1947)). However, the Supreme Court recently stated as follows:

> We begin with the familiar canon of statutory construction that the starting point for interpreting a statute is the language of the statute itself. *Absent a clearly expressed legislative intention to the contrary*, that language must ordinarily be regarded as conclusive.

Consumer Product Safety Commission v. GTE Sylvania, 447 U.S. 102, 108 (1980) (emphasis added). In the *Iselin* case cited by plaintiff, there was no "clearly expressed legislative intention." In the instant case, however, Congress' intent, as expressed in the legislative history, *see supra*, is very clear. Congress intended, through the 1984 amendments, to *eliminate* the very type of refund sought in the instant case. Thus, in light of the recent guidance from the Supreme Court, the statute should be

construed so as to reach this result. Furthermore, "[i]t is a well settled rule that statutory exemptions from taxation, being a matter of grace, are to be strictly and narrowly construed." *King Christian Enterprises, Inc. v. Government of the Virgin Islands*, 345 F.2d 633, 637 (3d Cir. 1965), *quoted in Tracy Leigh Development Corp. v. Government of the Virgin Islands*, 501 F.2d at 443. We therefore do not see section 3121(a) as supporting plaintiff's claim for a refund.

B.

In the alternative, plaintiff relies on the *Rowan* decision. The instant case involves payments made to establish a retirement annuity plan of the type described in section 403(b) of the Code. Pursuant to section 403(b), the entire amount contributed, i.e., both the salary reduction and the salary supplement amounts, is excludable from the employee's gross income for federal income tax purposes. However, Rev. Rul. 65-208, which the plaintiff itself followed over a period of years, requires that the salary reduction sums be included for FICA purposes. Because of this variance in treatment for income tax and FICA purposes, the *Rowan* case is significant.

In *Rowan Companies, Inc. v. United States*, 452 U.S. 247 (1981), the Supreme Court considered whether meals and lodging provided employees by their employer on its business premises for its own convenience constituted "wages" for purposes of FICA and the Federal Unemployment Tax Act (FUTA). Treasury regulation of long standing specifically excluded meals and lodging from the definition of "wages" for income tax withholding purposes but included them within the definition of "wages" for FICA and FUTA purposes. The district court and the court of appeals had found that the different interpretations of the definition of "wages" were justified by the different purposes of FICA and FUTA, on the one hand, and income tax withholding, on the other.

The Supreme Court reversed, holding that, absent express congressional intent to the contrary, the term "wages" is to be

interpreted in the same manner for FICA and FUTA purposes as for income tax withholding purposes. The Court stated:

> The plain language and legislative histories of the relevant Acts indicate that Congress intended its definition to be interpreted in the same manner for FICA and FUTA as for income tax withholding.

Id. at 263.

If it has vitality, *Rowan* obviously helps the plaintiff here. As noted earlier, however, Congress, in the 1983 Act, expressly overruled the broad holding of *Rowan*, at least as it applied to claims for refund of FICA taxes on salary reductions. In the 1984 Act, Congress gave retroactive effect to the 1983 legislation. Thus, for the plaintiff to rely on its alternative argument, it must show that Congress acted unconstitutionally in overruling *Rowan*. To this end, plaintiff presents two principal arguments.[4]

First, plaintiff alleges that Congress violated the equal protection clause by impermissibly distinguishing among employers. In particular, it asserts that Congress, in denying refunds, improperly favored employers who had failed to comply with Rev. Rul. 65-208 (and thus failed to pay the tax) over those who had complied with the ruling. This argument is without merit. The legislative history of the 1984 Act expressly disclaims any intent to validate failures to withhold FICA taxes. *See* H.R. Rep. No. 432, *supra*, at 1658. Thus, the Government, if not barred by the statute of limitations, conceivably could sue the non-complying employers and recover from them the additional taxes due.

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4. The plaintiff, in addition to its main arguments, alleges that Congress, in the 1984 Act, violated the separation of powers doctrine by prescribing a rule of decision in a pending case. *See United States v. Klein*, 80 U.S. (13 Wall.) 128, 148 (1871); *United States v. Sioux Nation of Indians*, 448 U.S. 371, 404 (1979). This argument is without merit. Congress did not desire to effect a rule of decision only in a particular case (for example, by taking away jurisdiction, as in *Klein*). Instead, Congress changed the tax law generally. To be sure, the congressional change has rather broad application, applying as it does even to *non*-litigating taxpayers.

A more troublesome argument is that Congress, in imposing a retroactive tax, violated the due process clause. It is clear that Congress may, without violating the due process clause, enact legislation having retroactive application if it is justified by a rational legislative purpose. *Pension Benefit Guaranty Corp. v. R. A. Gray & Co.*, 104 S.Ct. 2709, 2718 (1984). Furthermore, when such legislation is "curative"[5] in character, as in this instance, the retroactive application is typically entitled to be liberally construed. *See Goddard v. Frazier*, 156 F.2d 938, 942 (10th Cir. 1946); 2A C. Sands, *Sutherland Statutory Construction* §41.11, at 290 (4th ed. 1973). There also appears to be a greater tolerance toward retroactive application of laws which coincide with longstanding public policy than where that is not the case. *United States v. Perry*, 431 F.2d 1020, 1024 (9th Cir. 1970).

Almost without exception, Congress has given general revenue statutes an effective date prior to the date of actual enactment, as it has to the Internal Revenue Codes of 1939 and 1954. *United States v. Darusmont*, 449 U.S. 292, 296 (1981). With respect to income tax statutes, retroactive application apparently has been confined to short periods so as to include profits from transactions while the statute was in process, or within so much of the calendar year as preceded the enactment. *United States v. Hudson*, 299 U.S. 498, 500-501 (1937), *cited with approval in United States v. Darusmont*, 449 U.S. at 297. Taxation is "but a way of apportioning the cost of government among those . . . privileged to enjoy its benefits and [who] must bear its burdens" and its "retroactive imposition does not necessarily infringe due process." *Welch v. Henry*, 305 U.S. 134, 146-47.

It is true that *Welch v. Henry* created some doubt as to the constitutional validity of imposing retroactive tax liability for periods preceding the year prior to the passage of the legislation. 305 U.S. at 146-51. In fact, some state courts, in applying *Welch*

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5. "Curative" legislation is generally defined as legislation enacted to cure defects in prior law. 2A C. Sands, *Sutherland Statutory Construction* §41.11, at 289 (4th ed. 1973).

v. Henry, have held unconstitutional any tax statute which attempts to be applied retroactively beyond the year of the legislative session immediately preceding the year of the statute's enactment. *See, e.g., Commonwealth v. Budd Co.*, 379 Pa. 159, 108 A.2d 563 (1954), *appeal dismissed*, 349 U.S. 935 (1955); *Gulf & Western Corp. v. Commonwealth*, 74 Pa. Commw. 493, 459 A.2d 1369 (1983). The Supreme Court, however, has never actually prohibited such retroactivity. Instead, the Court has spoken only in vague terms, permitting an income tax statute to be retroactively applied to "recent transactions." *Welch v. Henry*, 305 U.S. at 150; *Cooper v. United States*, 280 U.S. 409, 411 (1930); *cf. United States v. Hudson*, 299 U.S. at 500 (1937) ("relatively short periods"). Similarly, no federal court of appeals has yet adopted an absolute temporal limitation on retroactivity.[6] *See, e.g., Shanahan v. United States*, 447 F.2d 1082, 1084 (10th Cir. 1971); *First National Bank v. United States*, 420 F.2d 725, 730 (Ct. Cl.), *cert. denied*, 398 U.S. 950 (1970); *Wilgard Realty Co. v. Commissioner*, 127 F.2d 514, 517 (2d Cir 1942).

We find some guidance in the rather flexible criteria delineated by the Court in *Welch v. Henry*: "In each case it is necessary to consider the nature of the tax and the circumstances in which it is laid before it can be said that its retroactive application is so harsh and oppressive as to transgress the constitutional limitation." 305 U.S. at 147. The federal courts have generally interpreted these criteria as indicating that "[r]etroactive operation is constitutional where it is not harsh, arbitrary or unfair." *Shanahan*, 447 F.2d at 1084. An amplification of this principle is provided by an earlier case:

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6. This is true even outside the taxation area. With respect to the Fair Labor Standards Legislation of 1938, 29 U.S.C.A. §§201-219, creating rights of employees engaged in interstate commerce to overtime pay, courts have rejected the due process challenge to the constitutionality of congressional legislation enacted nine years later (Portal to Portal Act of 1947, 29 U.S.C.A. §251 et seq.), retroactively obliterating "causes of action for overtime pay, liquidated damages and counsel fees which had accrued under the Fair Labor Standards Act previous to the enactment of the Portal to Portal Act." *Darr v. Mutual Life Insurance Co.*, 169 F.2d 262 (2d Cir. 1948); *Battaglia v. General Motors Corp.*, 169 F.2d 254 (2d Cir.), *cert. denied*, 335 U.S. 887 (1948); *accord Fisch v. General Motors Corp.*, 167 F.2d 267 (6th Cir. 1968).

> The decisive test in this instance is whether this taxpayer has had its expectations as to taxation unreasonably disappointed . . . . [R]etroactive taxation is not so arbitrary and oppressive as to be unconstitutional if it is no more burdensome than the taxpayer should have expected it to be when he did the thing which created the tax liability . . . . And when it is not, whether the period of retroactivity is comparatively long or short is of little consequence provided it isn't too long to be within reason.

Wilgard Realty Co., 127 F.2d at 517.

In the instant case, Congress believed that the broad holding of *Rowan* contravened the policies and principles underlying the statutory schema and philosophy of our social security and Medicare systems. It therefore overruled that holding and codified Rev. Rul. 65-208 — a ruling that had been applied and enforced for over fifteen years. Even this plaintiff had conformed to it in making its reports and paying its FICA taxes quarterannually year after year, including for a significant period *after* the *Rowan* decision. Thus, it can hardly be said that the plaintiff had its tax expectations unreasonably disappointed or that it is a victim of oppressive taxation as a result of the legislation overruling *Rowan*. The 1984 Act, as demonstrated by its legislative history, merely averts the potentially disruptive effect of the *Rowan* decision on the multitude of transactions properly reported by taxpayers in accordance with the applicable rule of law at the time. *See* H.R. Rep. No. 432, *supra*, at 1658. The statute imposes neither a new nor an unforeseeable or unexpected tax liability on either the employer or its employees. Thus, we believe that retroactive application of the statute under the circumstances we have here "is not so arbitrary and oppressive as to be unconstitutional." *Id*. We therefore reject plaintiff's alternative argument based on *Rowan*.

IV.

In summary, we hold that neither 26 U.S.C. §3121(a), even as it existed prior to the relevant amendments, nor the *Rowan*

decision entitles plaintiff to a refund of the FICA taxes paid. Accordingly, the judgment of the district court will be affirmed.

WEIS, *Circuit Judge*, dissenting.

I dissent because the majority fails to accord proper consideration to the wording of the statute, and gives undue weight to a revenue ruling as well as to the 98th Congress' interpretation of a statute enacted some 45 years earlier.

Plaintiff contends that certain payments into retirement funds for the years 1979 to 1982 on behalf of its employees were not subject to Social Security taxes (FICA). The question in this case is whether the statute includes within "wages" the salary reduction amounts.

The logical place to begin is with the statutory language. The exclusion from FICA wages of payments for retirement annuities, or similar arrangements, dates back to 1939. 53 Stat. 1373. Section 209 of the Act defined "wages" subject to the FICA tax as:

> "[A]ll remuneration for employment, . . . except that such term shall not include . . .
>
> (1) [an amount in excess of the Social Security base]:
>
> (2) The amount of any payment made to, or on behalf of, an employee under a plan or system established by an employer (including any amount paid by an employer for . . . annuities . . .) on account of
>
> A. retirement . . ."

The House Report explained that the definition

> "excludes all payments made by the employer to or on behalf of an employee . . . under a plan or system providing for retirement benefits (including pensions), . . . These payments will be excluded even though the amount or possibility of such payments is taken into consideration in fixing the amount of remuneration and even though such payments are required, either expressly or impliedly, by the contract of employment."

H. Rep. No. 728, 76th Cong., 1st Sess., *reprinted in* 1939-2 Cum. Bull. 538, 548. Parallel references appear in the Senate Report. *See* S. Rep. No. 734, 76th Cong., 1st Sess., *reprinted in* 1939-2 Cum. Bull. 565, 575-76.

The House Report articulated the reason for excluding from FICA wages, among other items, payments by an employer to purchase retirement annuities: "This will save employers time and money but what is more important is that it will eliminate any reluctance on the part of the employer to establish such plans due to the additional tax cost." H. Rep. No. 728, 76th Cong., 1st Sess., *reprinted in* 1939-2 Cum. Bull. at 543.

The pertinent part of the definition of wages was not changed until 1983. In the meantime two revenue rulings were issued by the Internal Revenue Service. In 1953, Revenue Ruling 181 discussed the taxability of the amount paid by an employer as premiums for an employee's annuity. The ruling stated,

> "The payment of the insurance premium by the employer does not fall within the meaning of the term 'wages' as defined in section 1621 of the Code or section 1426(a)(3) [later codified at 121] of the Federal Insurance Contributions Act. Therefore, such payment is not subject to withholding either for Federal employment or income tax purposes."

Twelve years later, the IRS issued Revenue Ruling, 65-208. 1965-2 Cum. Bull. 383. An employee had agreed to a salary reduction in a specified sum, which was used to purchase a retirement annuity. The amount was properly excluded from the employee's wages for income tax purposes under section 403(b), but the ruling opined that the sums were nevertheless within the definition of wages for FICA purposes. The ruling "distinguished" the one issued in 1953, saying that the earlier case contemplated the situation "where an organization uses its own funds for the purchase of an annuity contract, rather than one where the employees take a voluntary reduction in salary to provide the necessary funds."

The 1965 ruling cited no authority for its position, did not discuss the 1939 legislative history for the statutory provision,

and did not attempt to explain how the interpretation was consistent with the statutory language.

As noted, the definition of "wages" was changed in 1983. By this time the financial stability of the Social Security system was at stake, and congressional emphasis shifted from ease of employer administration to conservation of funds. As part of the overhaul, Congress deleted the word "retirement" and expressly included in the FICA wage base payments "made by reason of a salary reduction agreement" for the purchase of an annunity contract. These amendments were made applicable to remuneration paid after December 31, 1983. 97 Stat. 125.

Concern about the financial soundness of the Social Security System continued, and in 1984 Congress addressed the potentially disruptive effect of the *Rowan* decision discussed in the majority opinion. The 1984 provision made retroactive the part of the 1983 amendment which specifically counteracted *Rowan*. Despite what was said in the Committee reports, the legislation passed in 1984 did not change the effective date of the definition of wages as modified in 1983. Because the relevant exclusion from the FICA definition of wages between 1939 and 1983 was not altered by statute, the amended definition does not apply to the period at issue here — 1979-1982.

Ignoring the statutory language and the pertinent legislative history, the IRS refers to the 1965 ruling as the "controlling authority before *Rowan*." That characterization is inaccurate because the ruling was neither "controlling" nor "authority."

The IRS does not mention the limited efficacy these rulings are accorded by the Service itself. A cautionary note appears at the beginning of the Cumulative Bulletin:

> "The rulings reported . . . are for the information of taxpayers and their counsel as showing the trend of official opinion in the administration of the Bureau of Internal Revenue; the rulings other than Treasury Decisions have none of the force or effect of Treasury Decisions and do not commit the Department to any intepretation of the law which has not been formally approved and promulgated by the Secretary of the Treasury.

* * *

Unless otherwise specifically indicated, all published rulings and decisions have received the consideration and approval of the Chief Counsel for the Bureau of Internal Revenue."

A revenue ruling is simply the opinion of the Service's legal counsel which has not received the approval of the Secretary nor of Congress. A ruling is not a regulation and does not bind the IRS. As one court colorfully explains, a ruling is "made to order for the Commissioner by his legal staff, and [has] no more binding or legal force than the opinion of any other lawyer." *United States v. Bennett*, 186 F.2d 407, 410 (5th Cir. 1951). *See also Dixon v. United States*, 381 U.S. 68, 73-75 (1965). In *Biddle v. Commissioner*, 302 U.S. 573, 582 (1938), the Supreme Court cautioned that "departmental rulings not promulgated by the Secretary are little aid in interpreting a tax statute."

This court has also spoken to the subject on a number of occasions. In *Geib v. New York State Teamsters Conference Pension & Retirement Fund*, 758 F.2d 973, 976 (3d Cir. 1985), we pointed out that "although revenue rulings may be helpful, they do not have the force of law." See also *Bencivenga v. Western Pa. Teamsters & Employers Pension Fund*, No. 84-3654, slip op. at 14 (3d Cir. June 7, 1985). *Becker v. C.I.R.*, 751 F.2d 146 (3d Cir. 1984), illustrates that a taxpayer relies on revenue rulings at his peril because the Commissioner is free to — and does — revoke them retroactively, at any time.

The majority and the district court emphasize the 1965 revenue ruling but, when properly evaluated, it provides inadequate support. The ruling is simply an attempt by the legal staff of the IRS to legislate.

Revenue Ruling 65-208 contradicts the statutory language as well as the legislative history. The statute reads "all payments made by the employer to or on behalf of an employee" for retirement are excluded. The legislative history explains that "these payments will be excluded even though the amount or possibility of such payments is taken into consideration in fixing the amount of remuneration." Moreover, as noted earlier, the

impetus for the definition of wages came from a congressional desire to encourage the establishment of retirement, disability, and medical payment plans to supplement the minimal social security benefits which then existed. Revenue Ruling 65-208 completely overlooked the relevant congressional policy expressed some 26 years before the ruling was rendered.

In addition, the ruling is inconsistent with the 1953 ruling as well as Treasury Regulation 31.3121(a)(2)-1(d), the text of which is lifted almost verbatim from the Committee reports of the 1939 Act. The government's explanation of the inconsistency is unconvincing.

The effort to legitimatize the 1965 revenue ruling relies on the legislative history of the 1983 and 1984 amendments. But the Supreme Court has admonished that the views of members of a later Congress are entitled to little, if any, weight in interpreting the actions of an earlier Congress. *International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 354 n.39 (1977). It is the intent of the Congress that enacted the provision not the views of a subsequent Congress that controls. *United States v. Vogel Fertilizer Co.*, 455 U.S. 16, 34 (1982).

Even the limited weight accorded the views of a subsequent Congress necessarily decreases as the interval between sessions lengthens. As the Court noted in *United Air Lines, Inc. v. McMann*, 434 U.S. 192, 200 n.7 (1977), "Legislative observations 10 years after passage of the Act are in no sense part of the legislative history." Certainly, the overlap in membership between the Congress which passed the 1939 Act and that which some 44 years later considered the 1983 amendments was at best infinitesimal.

In the legislative history to the 1983 amendments, the committee said it intended to "codify" the 1965 revenue ruling, the validity of which was called into doubt after the *Rowan* decision. S. Rep. No. 23, 98th Cong., 1st Sess. 39, *reprinted in* 1983 U.S. Code Cong. & Ad. News 143, 180; H. Rep. No. 25, *id.* at 298. I read this observation as a concession that the revenue ruling was not authoritative and that a statutory amendment was necessary to effect its aim. It should be noted, also, that the 1983 amendments went further than the revenue ruling by absorbing

into the FICA wage base the employer's contribution, which had previously not been included.

The 1983 amendments were consistent with Congress' concern about the solvency of the Social Security system. As the House Report states, "The primary focus of your Committee's bill is on restoring the financial soundness of the Old Age and Survivors Insurance (OASI) program which is facing severe cash shortfalls over the next seven years." H. Rep. No. 25, 98th Cong., 1st Sess., 1983 U.S. Code Cong. & Ad. News 219. Despite that concern, Congress did not make the 1983 amendments to the definition retroactive but provided they would be applicable only to remuneration paid after December 31, 1983. Consequently, neither the 1983 nor the 1984 amendments have any effect on the claim that Temple has submitted for the years 1979-1982.

My analysis of the wording of the FICA statute and its legislative history does not depend on the Supreme Court's holding in *Rowan*. Although that decision provides additional support for my conclusion, it is not essential to it.

If *Rowan* were to be applied to this case a synopsis of the reasoning would begin by noting that Congress, in the early history of the Social Security Act, clearly intended that the term wages would mean the same in both the income tax and the FICA contexts. The Service concedes that the payments to the pension fund were not subject to income tax, and therefore they were not subject to the FICA tax.

However, the Supreme Court's holding was repudiated by Congress in 1983 and made retroactive in 1984. Congress has often disagreed with a judicial construction of a statute and has then amended it, but generally such amendments are applied only prospectively.

The Supreme Court has held that retroactive imposition of a tax for one year has generally been thought not to violate due process. *See United States v Darusmont*, 449 U.S. 292 (1981). One case held that a two-year period was not excessive when a state legislature met only bi-annually and the retroactivity was limited to the intervening period. *Welch v. Henry*, 305 U.S. 134 (1938). *See also United States v. Hudson*, 299 U.S. 498 (1937);

Milliken v. United States, 283 U.S. 15 (1931); *Cooper v. United States*, 280 U.S. 409 (1930).

If the 1984 amendments are applied to the case at hand, Congress would be reaching back five years to 1979 and, in addition, would be undertaking the function of construing a statute enacted and re-enacted by previous Congresses. I am not convinced by the majority's treatment of these problems and note that they have cited no case which approves retroactive taxation similar to that attempted by Congress here.

My approach to this case, however, does not require that I determine whether Congress could properly make the 1983 amendments of "wages" retroactive because Congress clearly did not do so. The 1984 language does not state that the section at issue is to be applied retroactively. The majority concedes that fact but nevertheless, because of statements in the legislative history pertinent only to the *Rowan* provision, supplies wording that Congress did not include in the statute. This is contrary to what the Supreme Court said in *Iselin v. United States*, 270 U.S. 245, 251 (1926), — the courts should not enlarge a statute so that "what was omitted, presumably by inadvertence, may be included within its scope. To supply omissions transcends the judicial function."

Although Congress did not relish the idea of refund suits like the one at hand, in 1984 it confined its efforts to counteracting the *Rowan* decision and did not disturb the plainly worded effective date assigned to the definition of wages in 1983. Perhaps the omission was inadvertent, but that does not appear in the legislative history.

Furthermore, I see no need for the court to be unduly solicitous about curing statutory deficiencies to aid the IRS in doubtful cases. The Service insists on adherence to the technical requirements of the Code when convenient. That approach is not improper, but the same rule should apply when it is the taxpayer who benefits. He who lives by the sword of rigid adherence to technicalities should not be surprised at being nicked in return from time to time.

I believe that under the language of the applicable section of the Internal Revenue Code the taxpayer is entitled to a refund. I dissent from its denial.

A True Copy:

Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

TEMPLE UNIVERSITY	:	CIVIL ACTION
	:	
v.	:	
	:	
UNITED STATES OF AMERICA	:	NO. 83-5549

MEMORANDUM AND ORDER

KELLY, J. JUNE 29, 1984

The parties have submitted cross motions for summary judgment contending there are no remaining issues of fact to be decided.

The specific issue in this case is whether the amounts of voluntary employee salary reductions for the years 1979 to 1982 used to purchase tax deferred annuities for the employees constitute "wages" for Social Security tax purposes, subject to the Federal Insurance Contribution Act ("FICA").

FACTS

Temple University is a non-profit educational organization described in section 501(c)(3) of the Internal Revenue Code ("Code") and exempt from federal income tax under section 501(a) of the Code. Pursuant to its section 501(c)(3) status, Temple was permitted to establish a salary reduction retirement annuity plan of the type described in section 403(b) of the Code. This plan was in effect both before, during and after the period at issue in this case, 1979 through 1982 inclusive.

Under the plan, employees electing to participate enter into salary reduction agreements under which they agree to stated reductions in their salary for the purpose of funding in part the purchase of nonforfeitable, nontransferable annuity contracts on the employees' behalf. The salary reduction agreement applies only to amounts earned by the participating employee subsequent to the effective date of the agreement, and only one such

agreement may be executed by each employee during any year. The agreement is legally binding and irrevocable with respect to amounts earned while the agreement is in effect. In this plan, Temple's total contribution for the purchase of section 403(b) annuities exceeds the total salary reduction amounts. Temple has made no claim with respect to the amount contributed that exceeds the employees' salary reduction amount.

Pursuant to section 403(b) of the Code the amount contributed by Temple for the purchase of section 403(b) annuities for a participating employee's account is excludible from the employee's gross income for federal income tax purposes. No withholding of federal income tax by Temple is required with respect thereto.

Pursuant to Revenue Ruling 65-208, 1965-2 Cumulative Bulletin 383, Temple timely paid to the Internal Revenue Service employer FICA taxes and withheld and paid employee FICA taxes in accordance with sections 3111 and 3101 of FICA, respectively, with respect to the salary reduction amounts applied by Temple toward the purchase of section 403(b) annuities during the years 1979 through 1982, inclusive.

On April 12, 1983, subsequent to the decision of the U.S. Supreme Court in *Rowan Companies v. U.S.*, 452 U.S. 247 (1981), Temple timely filed claims for refund of employer and employee FICA taxes for each of the years 1979 to 1982, inclusive, together with statutory interest thereon, on behalf of itself and those of its employees and former employees from whom it had withheld FICA taxes with respect to salary reduction amounts in those years.[1]

Section 3121(a) of the Internal Revenue Code defines "wages" for purposes of FICA. However, salary reduction agreements are not encompassed by section 3121(a) which provides amounts paid by an employer for the purchase of tax deferred

1. In conformity with Treas. Reg. ¶31.6402(a)-2, all of the said employees and former employees were notified by Temple of their possible right to refund of FICA taxes and were furnished consent forms on which to indicate their consent to inclusion in Temple's refund claims. Exhibits 5, 6, 7 and 8 to the Complaint indicate which employees and former employees gave such consents.

annuities on behalf of its employees' retirement are not considered wages subject to FICA tax. In Revenue Ruling 65-208 the Internal Revenue Service has taken the position that the salary reduction portion of an employes contributions are wages for FICA purposes.[2] And, prior to the Supreme Court's decision in *Rowan Companies, Inc. v. United States*, 452 U.S. 247 (1981), it was universally held that amounts used to purchase deferred annuities for employees of Section 501(c)(3) organizations were considered wages subject to FICA tax to the extent the payments were made pursuant to salary reduction agreements. Rev. Rul. 65-208, 1965-1 C.B. 383. This result obtained because the amounts used to purchase the annuities were provided by the employees through their voluntary salary reduction, and were not funds of the employer. Thus, during the years in question, Temple University withheld FICA taxes on its payments to purchase deferred annuities on behalf of its employees. Based on *Rowan* plaintiff claims that payments to purchase annuities on behalf of its employees, made as a result of salary reduction agreements, are excluded from FICA taxation, regardless of the fact that the purchase of the annuities is pursuant to salary reduction agreements. I believe this to be a distinction without a difference.

Temple contends that *Rowan Companies, Inc. v. United States*, 452 U.S. 247 (1981) is controlling. I disagree. In *Rowan*, the Court held that meals and lodging provided by an employer for its own convenience did not constitute "wages" for FICA purposes. However, in reaching its decision the Court noted that such meals and lodging were specifically excluded from taxable income under 29 U.S.C. §119, and that consistent treatment should result under both the income tax withholding provisions and the FICA tax provisions. Since the meals and lodging were not subject to income tax, the Court concluded that they must also be excluded from the term "wages" for FICA tax purposes.

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2. Section 3121(a)(5)(E) specifically provides that payments made after December 31, 1983, to purchase Section 403(b) annuities pursuant to salary reduction agreements are wages subject to taxation for FICA purposes.

The Supreme Court in *Rowan* stated that Congress intended a consistent interpretation of the term "wages" for income tax withholding and FICA purposes, and it struck down a Treasury Regulation which did not interpret FICA wages "in a consistent or reasonable manner."

The *Rowan* decision was based on the Court's interpretation of congressional intent. If the Government's interpretation of FICA wages "implements the congressional mandate in some reasonable manner" then it should be upheld. *Rowan*, 452 U.S. at 252. In determining whether the congressional mandate is being implemented, the court must focus, *inter alia*, on "the degree of scrutiny Congress has devoted to the regulation." *Id.* at 253.

I find Rev. Rul. 65-208 to be a reasonable implementation of the Congressional mandate since it results in consistent tax treatment of "wages".

Temple argues that Rev. Rul. 65-208 is contrary to the express command of Congress. I believe plaintiff is incorrect. In the Social Security Amendments of 1983, P.L. 98-21, Congress discussed the potential impact of the *Rowan* decision, and decided to codify the result of Rev. Rul. 65-208. As a result, Section 3121(a)(5)(E) was added to the Internal Revenue Code, and provides wages for FICA proposes *excludes*:

> (5) any payment made to, or on behalf of, an employee or his beneficiary—
>
> * * *
>
> (E) under or to an annuity contract described in Section 403(b), *other than a payment for the purchase of such contract which is made by reason of a salary reduction agreement* (whether evidenced by a written instrument or otherwise) (emphasis added).

Under the Social Security Amendments of 1983, therefore, payments by an employer for the purchase of Section 403(b) annuities which are made under salary reduction agreements are

included in wages under FICA.[3] Additionally, Section 3121(a) was amended to include the following language:

> Nothing in the regulations prescribed for purposes of chapter 24 (relating to income tax withholding) which provides an exclusion from "wages" as used in such chapter shall be construed to require a similar exclusion from "wages" in the regulations prescribed for purposes of this chapter.[4]

Thus, in enacting the Social Security Amendments of 1983, Congress codified Rev. Rul. 65-208, and specifically rejected the language in *Rowan* that the term "wages" had to be interpreted the same for income tax withholding and FICA purposes.

The legislative history of the Social Security Amendments of 1983 reflects the long standing congressional intent to narrowly restrict the forms of compensation which are excluded from the FICA wage base, and further indicates support for the Service's position embodied in Rev. Rul. 65-208. According to the Senate Report:

> Under case or deferred arrangements, certain tax-sheltered annuities, certain cafeteria plans, and eligible State deferred compensation plans, the employer contributes fund which are set aside by individual employees for individual savings arrangements, and thus, the committee believes that such employer contributions should be included in the FICA base, as is the case for IRA contributions. Otherwise, individuals could, in effect, control which portion of their compensation was to be included in the so-

---

3. Section 3121(a)(5)(E), cited above, was added by Section 324(a)(2) of P.L. 98-21, and was made effective with respect to remuneration paid after December 31, 1983. As discussed below, there is currently pending a technical correction to the effective date provisions of the Social Security Amendments of 1983 which, if passed, would ensure the same result in the instant case.

4. This language was added by Section 327(b)(1) of the Social Security Amendments of 1983, P.L. 98-21, and was made effective with respect to remuneration paid after December 31, 1983.

cial security wage base. This would make the system partially elective and would undermine the FICA tax base.[5]

In discussing the specific reason for adding Section 3121(a)(5)(E) the Senate Report states:

> The bill also provides that any amounts paid by an employer to a tax-sheltered annuity by reason of a salary reduction agreement between the employer and the employee would be includible in the employee's social security wage base. *The committee intended that the provision would merely codify the holding of Revenue Ruling 65-208, 1965-2 Cum. Bull.* 383, without any implication with respect to the issue of whether a particular amount paid by an employer to a tax-sheltered annuity is, in fact, made by reason of a "salary reduction agreement". (Emphasis added).

Id. at 41.

Finally, the Senate Report states with respect to the *Rowan* decision that:

> The social security program aims to replace the income of beneficiaries when that income is reduced on account of retirement and disability. Thus, the amount of "wages" is the measure used both to define income which should be replaced and to compute FICA tax liability. Since the security system has objectives which are significantly different from the objective underlying the income tax withholding rules, the committee believes that amounts exempt from income tax withholding should not be exempt from FICA unless Congress provides an explicit FICA tax exclusion.

Id. at 42.

An appropriate Order follows.

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5. S. Rep. No. 98-23, 98th Cong., 1st Sess. 40, reprinted in [1983 No. 2] U.S. Code Cong. & Ad. News 143.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

TEMPLE UNIVERSITY	:	CIVIL ACTION
v.		
UNITED STATES OF AMERICA	:	NO. 83-5549

ORDER

AND NOW, this 29th day of June, 1984, for the reasons set forth in the foregoing Memorandum, is is hereby ORDERED that:

1. Plaintiff's Motion for Summary Judgment is DENIED.

2. Defendant's Motion for Summary Judgment is GRANTED.

BY THE COURT:

JAMES McGIRR KELLY, J.

Supreme Court of the United States

No. A-427

TEMPLE UNIVERSITY, ETC.

Applicant,

v.

UNITED STATES

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

UPON CONSIDERATION of the application of counsel for petitioner(s),

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including February 21, 1986.

/s/ William J. Brennan, Jr.

Associate Justice of the Supreme Court of the United States

Dated this 2nd
day of December, 1985.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 84-1416

TEMPLE UNIVERSITY — of the Commonwealth
System of Higher Education,

Appellant

v.

UNITED STATES OF AMERICA

(Civil Action No. 83-3549 — E.D.Pa.)

SUR PETITION FOR REHEARING

PRESENT: ALDISERT, *Chief Judge*, SEITZ, ADAMS, GIBBONS, HUNTER, WEIS, GARTH, HIGGINBOTHAM, BECKER and MANSMANN, *Circuit Judges*.

The petition for rehearing filed by appellant in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By the Court

_____
Circuit Judge

DATED: September 24, 1985

United States Court of Appeals

FOR THE THIRD CIRCUIT

No. 84-1416

TEMPLE UNIVERSITY — of The Commonwealth System of Higher Education,

Appellant

v.

UNITED STATES OF AMERICA

(D.C. Civ. No. 83-5549)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Present: SEITZ, WEIS and ROSENN, *Circuit Judges*.

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and was argued by counsel April 29, 1985.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court entered July 3, 1984, be, and the same is hereby affirmed. Costs taxed against appellant.

ATTEST:

M. Elizabeth Ferguson
Chief Deputy Clerk

July 22, 1985

Costs taxed in favor of appellee as follows:
Brief $20.80

Certified as a true copy and issued in lieu of a formal mandate on October 2, 1985.

Test: M. Elizabeth Ferguson
Chief Deputy Clerk, U.S. Court of Appeals for the Third Circuit

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

TEMPLE UNIVERSITY	:	CIVIL ACTION
	:	
v.	:	
	:	
UNITED STATES OF AMERICA	:	NO. 83-5549

CIVIL JUDGMENT

Before THE HONORABLE JAMES McGIRR KELLY

AND NOW, this 2nd day of July 1984, in accordance with the Memorandum/Order dated June 29, 1984,

IT IS ORDERED that Judgment be and the same is hereby entered in favor of defendant, United States of America, and against plaintiff, Temple University.

BY THE COURT:

ATTEST: ARLENE L. QUINN

Deputy Clerk

REGULATIONS 111, SECTION 29.22(b)(2)-5: Rev. Rul. 181
Employees' annuities.
(Also Section 147, Section 29.147-2;
Section 1426, Section 408.227, Regulations
128; Section 1621, Section 405.101, Regulations 116.)

INTERNAL REVENUE CODE

An amount paid by an employer exempt from Federal income tax under section 101(6) of the Internal Revenue Code as an insurance premium for the purchase of an annuity contract of the type referred to in section 22(b)(2)(B) of the Code is not required to be included in the income of the employee for whom the annuity is purchased. The employee will be taxed upon the basis of the amounts he actually receives under the annuity contract and at the time he receives such annuity payments. The payment of the insurance premium by the employer does not fall within the meaning of the term "wages" as defined in section 1621 of the Code or section 1426(a)(3) of the Federal Insurance Contributions Act. Therefore, such payment is not subject to withholding either for Federal employment or income tax purposes. The employer is not required to file an information return, Form 1099, under section 147 of the Code, with respect to such payment.

(Also Section 403; 1.403(b)-1.) Rev. Rul. 65-208

An organization, described in section 501(c)(3) of the Internal Revenue Code of 1954 and exempt from income tax under section 501(a) of the Code, established a supplemental annuity plan for the benefit of its employees. Under the plan, an employee entered into an agreement to take a reduction in salary for the purpose of providing funds for the purchase of a nontransferable annuity contract on his behalf. The agreement applies only to amounts earned by the employee subsequent to the effective date of the agreement. The employee is not permitted to make more than one such agreement during any one taxable year. *Held*, under these circumstances, the amounts used pursuant to the salary reduction agreement to purchase the annuity contract are "wages" for purposes of section 3121(a)(2) of the Federal Insurance Contributions Act, even though such amounts, within prescribed limits, are excludable from the employee's gross income for purposes of section 403(b) of the Code, and are not subject to the withholding of income tax.

Revenue Ruling 181, C.B. 1953-2, 111, distinguished.

Advice has been requested whether, under the circumstances described below, amounts used by an exempt organization to purchase an annuity contract for one of its employees are "wages" for purposes of the Federal Insurance Contributions Act (Chapter 21, subtitle C, Internal Revenue Code of 1954).

An organization, described in section 501(c)(3) of the Internal Revenue Code and exempt from income tax under section 501(a) of the Code, established a supplemental annuity plan for the benefit of its employees. Under the plan, an employee entered into an agreement with the organization to take a reduction in salary for the purpose of providing funds for the purchase of a nontransferable annuity contract on his behalf. The agreement applies only to amounts earned by the employee subsequent to the effective date of the agreement. The employee is not permitted to make more than one such agreement during any one taxable year.

For purposes of this determination, it is assumed that the purchase of the annuity contract under the circumstances described above meets the requirements of section 403(b) of the Code. Therefore, amounts used to purchase the annuity contract, within the prescribed limits are excluded from the employee's gross income under that section of the Code for the taxable year contributed.

The term "wages", as defined in section 3121(a) of the Federal Insurance Contributions Act, means all remuneration for employment, including the cash value of all remuneration paid in any medium other than cash, with certain exclusions. The exclusion pertinent here is contained in section 3121(a)(2) of the Act, which provides, in part, that the term "wages" shall not include the amount of any payment (including any amount paid by an employer for insurance or annuities, or into a fund, to provide for any such payment) made to, or on behalf of, an employee or any of his dependents under a plan or system established by an employer which makes provision for his employees generally on account of retirement.

The question involved here is whether amounts "paid by an employer" for an annuity contract on behalf of an employee must be given the same treatment for purposes of both section 403(b) of the Code and section 3121(a)(2) of the Federal Insurance Contributions Act.

The purposes of section 403(b) of the Code and section 3121(a)(2) of the Federal Insurance Contributions Act are substantially different. Therefore, a determination under section 403(b) of the Code that a particular amount is "contributed by the employer" for the purchase of an annuity contract for an employee does not necessarily require a similar determination that it is also an amount "paid by an employer" under section 3121(a)(2) of the Federal Insurance Contributions Act.

Accordingly, it is held that, under the circumstances described herein, the amounts used by the organization pursuant to the salary reduction agreement to purchase the annuity for the employee are "wages" for purposes of the Federal Insurance

Contributions Act, even though such amounts, within prescribed limits, are excludable from the employee's gross income for purposes of section 403(b) of the Code.

However, the withholding of income tax is not required on such amounts used by the organization to purchase the annuity contract on behalf of the employee. See Rev. Rul. 65-209, page 414 this Bulletin.

The instant case is factually distinguishable from Revenue Ruling 181, C.B. 1953-2, 111, which holds, in effect, that an amount paid by an exempt organization as a premium for the purchase of an annuity contract on behalf of an employee does not fall within the meaning of the term "wages" as defined by the Federal Insurance Contributions Act. That Revenue Ruling contemplates a situation where an organization uses its own funds for the purchase of an annuity contract, rather than one where the employee takes a voluntary reduction in salary to provide the necessary funds.

Revenue Ruling 181, C.B. 1953-2, 111, is hereby distinguished.

Temple is aware of the following fourteen cases involving issues identical to the instant case:

Adelphi University v. United States, No. 84-0714 (E.D. N.Y. 1984)

Canisius College v. United States, No. 84-1126 (W.D. N.Y. 1984)

Canisius College v. United States, No. 85-1016 (W.D. N.Y. 1985)

Children's Hospital v. United States, No. C-2-85-821 (S.D. Ohio 1985)

Children's Hospital of Michigan v. United States, No. 85-72327 (E.D. Mich. 1985)

Community General Hospital of Greater Syracuse v. United States, No. 85-1017 (W.D.N.Y. 1985)

Contributors to the Pennsylvania Hospital v. United States, No. 85-4671 (E.D. Pa. 1985)

John Carroll University v. United States, No. C85-1368 (N.D. Ohio 1985)

Lowell General Hospital Corp. v. United States, No. 84-160-5 (D. Mass. 1984)

Newark Beth Israel Medical Center v. United States, No. 459-85T (Ct. Cl. 1985)

Robert Morris College v. United States, No. 459-85T (Ct. Cl. 1985)

Temple University—Of The Commonwealth System of Higher Education v. United States, No. 85-3708 (E.D. Pa. 1985)

Xavier University v. United States, No. C-1-84-1151 (S.D. Ohio)

Yeshiva University v. United States, No. 2771 (S.D. N.Y. 1984)

In addition, the case of *University Health Center, Inc. v. United States*, No. 85-6340 (2d Cir. 1985), has been withdrawn without prejudice subject to reinstatement by the Plaintiff-Appellant within 60 days after this Court's final decision in the instant case.

Temple understands that the following 27 schools and hospitals have live refund claims, some of which are pending with the Service or are on extension with the Social Security Administration and some of which have been denied at the administrative level, but are still within the two-year period for filing in court:

Austin College (Sherman, TX)

Bryn Mawr College (Bryn Mawr, PA)

The Citadel Military College of South Carolina (Charleston, SC)

Francis Marion College (Florence, SC)

Jamestown College (Jamestown, ND)

Kenyon College (Gambier, OH)

Linfield College (McMinniville, OR)

Marywood College (Scranton, PA)

Mercer University (Macon, GA)

Mercy Hospital Center (Oshkosh, WI)

Mount Saint Clare College (Clinton, IA)

New Jersey Public School System (NJ)

Northwestern University (Evanston, IL)

Northern Kentucky University (Highland Heights, KY)

Phillips University (Enid, OK)

Northwestern University (Evanston, IL)

Princeton University (Princeton, NJ)

St. Cloud Hospital (St. Cloud, MN)

St. Joseph's Hospital of Mount Clemens (Mt. Clemens, MI)

Santa Fe Community College (Gainsville, FL)

Southern California College of Optometry (Fullerton, CA)

University of Mary Hardin Baylor (Belton, TX)

University of Southern California (L.A., CA)

University of Montana (Missoula, MT)

Vitebro College (LaCrosse, WI)

Wartburg College (Waverly, IO)

Wayne State University (Detroit, MI)

Supreme Court, U.S.
FILED
MAY 27 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-1401

In the Supreme Court of the United States

OCTOBER TERM, 1985

TEMPLE UNIVERSITY, ETC., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

CHARLES FRIED
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ROGER M. OLSEN
Acting Assistant Attorney General

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MICHAEL ROACH
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QUESTION PRESENTED

Whether the court of appeals correctly held that petitioner was not entitled to a refund of Federal Insurance Contributions Act (FICA) taxes paid during 1979-1982 on amounts deducted from its employees' salaries and used to purchase tax-sheltered retirement annuities for those individuals.

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In the Supreme Court of the United States

OCTOBER TERM, 1985

No. 85-1401

TEMPLE UNIVERSITY, ETC., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A25) is reported at 769 F.2d 126. The opinion of the district court (Pet. App. A26-A31) is reported at 595 F. Supp. 94.

JURISDICTION

The judgment of the court of appeals (Pet. App. A35) was entered on July 22, 1985. A timely petition for rehearing was denied on September 24, 1985 (Pet. App. A34). On December 2, 1985, Justice Brennan extended the time within which to file a petition for a writ of certiorari to and including Feb-

ruary 21, 1986 (Pet. App. A33), and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner is a nonprofit educational institution exempt from federal income tax under Section 501(c)(3) of the Internal Revenue Code.[1] During 1979-1982, the taxable years at issue, petitioner operated a retirement annuity plan for its employees. Employees who chose to participate in this plan agreed to accept a salary reduction in a stated percentage of their compensation (Pet. App. A3). The amounts thus deducted from the employees' salaries, together with additional amounts contributed by petitioner, were used to purchase retirement annuities for the participating workers (*ibid.*). Under Section 403(b) of the Code, amounts deducted pursuant to salary reduction agreements from the pay of workers employed by charitable or educational organizations, and used to purchase retirement annuities, are not subject to current federal income tax. Rather, income tax is deferred until such time as the employees actually receive payments under the annuity contracts. See Pet. App. A3 & n.1. Because of this tax-deferral feature, these arrangements are commonly called "tax-sheltered" retirement annuities. See H.R. Rep. 98-432, 98th Cong., 2d Sess. 1658 (1984).

Section 3121(a) of the Code defines the term "wages" for purposes of the Federal Insurance Contributions Act (FICA or social security payroll) tax.

---

[1] Unless otherwise noted, all statutory references are to the Internal Revenue Code of 1954 (26 U.S.C.), as amended (the Code or I.R.C.).

During the taxable years at issue, "wages" were defined generally to include "all remuneration for employment," but to exclude "the amount of any payment (including any amount paid by an employer for insurance or annuities * * *) made to, or on behalf of, an employee * * * on account of * * * retirement" (26 U.S.C. 3121(a)(2)(A)). In 1965, the IRS ruled that amounts withheld under salary reduction agreements and used to purchase tax-sheltered retirement annuities were "wages" within the meaning of this definition. Rev. Rul. 65-208, 1965-2 C.B. 383, 385. The Service reasoned that the words "amount paid by an employer for * * * annuities" as used in Section 3121(a)(2) should be construed to apply only in the situation "where an organization uses its own funds for the purchase of an annuity contract," as distinguished from the situation "where the employee takes a voluntary reduction in salary to provide the necessary funds" (1965-2 C.B. at 384-385). The Service accordingly concluded that salary reduction amounts used to purchase tax-sheltered annuities were "wages" subject to FICA tax, even though those amounts, pursuant to Section 403(b), were not currently includable in the employees' income for income tax purposes (1965-2 C.B. at 384-385).

During 1979-1982, the taxable years at issue, petitioner computed its FICA tax liability consistently with the principles set forth in Rev. Rul. 65-208. Petitioner accordingly treated the amounts withheld from its employees' pay under the salary reduction agreements as "wages" for purposes of Section 3121(a). Petitioner duly paid FICA taxes on the amounts so withheld (Pet. App. A3).

2. In 1981, this Court held in *Rowan Cos.* v. *United States*, 452 U.S. 247, that meals and lodging

provided for the convenience of the employer, the value of which was excludable from the recipient employees' income under Section 119, did not constitute "wages" for purposes of FICA tax (452 U.S. at 263). In the course of reaching that decision, the Court reasoned that the term "wages" as used in the Code's FICA provisions should generally be construed "to mean the same thing" (*id.* at 255) that it means in the Code's income-tax withholding provisions, where Congress has not explicitly provided otherwise. For many years prior to the *Rowan* decision, the IRS had taken the position that amounts withheld from employees' pay and used to purchase tax-sheltered retirement annuities did not constitute "wages" for income-tax withholding purposes. See I.R.C. § 3402; Rev. Rul. 65-209, 1965-2 C.B. 414 (amplifying Rev. Rul. 64-333, 1964-2 C.B. 114); Rev. Rul. 65-208, 1965-2 C.B. 383, 385. Based on this Court's reasoning in *Rowan*, therefore, petitioner in April 1983 filed timely claims for refund of that portion of its 1979-1982 FICA taxes that was attributable to its inclusion of the salary-reduction amounts in its employees' FICA wage base (Pet. App. A4, A27).

Following the denial of its administrative claims for refund, petitioner brought this refund suit in the United States District Court for the Eastern District of Pennsylvania. The district court granted summary judgment for the government, holding that petitioner was not entitled to a refund of FICA taxes for 1979-1982 (Pet. App. A26-A31). The court of appeals affirmed, one judge dissenting (*id.* at A1-A25).

ARGUMENT

The decision below is correct. Petitioner does not allege, nor is there, a conflict among the circuits on the substantive question of tax law presented. That question has no prospective importance, since it cannot arise for any taxable year after 1983. There is no basis for further review.

1. The court of appeals carefully analyzed the history of the IRS's administrative interpretation of Section 3121(a)(2)(A) and the actions that Congress took in 1983 and 1984 in response to this Court's *Rowan* decision. Based on that analysis, the court of appeals correctly held that funds used to purchase tax-sheltered retirement annuities, if provided by salary reduction agreements voluntarily entered into by employees, did not constitute "amount[s] paid by an employer for * * * annuities * * * on account of * * * retirement" within the meaning of Section 3121(a)(2)(A) as it existed prior to 1984.

a. As the court of appeals explained (Pet. App. A5-A8), the IRS first addressed the question presented in 1965. In Rev. Rul. 65-208, the Service held that, in determining the application of Section 3121(a)(2)(A), it was appropriate to distinguish between situations in which "an [employer] uses its own funds for the purchase of an annuity contract" and situations in which "the employee takes a voluntary reduction in salary to provide the necessary funds." 1965-2 C.B. at 385. Compare Rev. Rul. 181, 1953-2 C.B. 111 (holding that funds used to purchase retirement annuities are excludable from the FICA wage base when the employer uses its own funds). In thus distinguishing the two situations, the Service made a reasonable construction of the statute. While all of an employee's compensation emanates from his

employer in an ultimate sense, it was appropriate for the Service, in the case of salary reduction agreements, to regard the employee rather than the employer as the *proximate* source of the funds used to purchase the annuities, and hence to conclude that those funds were not "amount[s] paid by [the] employer" within the meaning of Section 3121(a)(2).

The reasonableness of the Service's 1965 construction of the statute is shown by its consistency both with common sense (Pet. App. A7) and with overriding legislative policy. Because "FICA taxes fund a national system of social insurance that supports important and extensive social security and medicare health programs," it was appropriate for the IRS to construe Section 3121(a)(2)(A) in a manner that reflected "the long-standing congressional intent to restrict the forms of compensation excluded from the FICA wage base" (Pet. App. A7, A6). As Congress noted in 1983, if individuals were free to immunize their salaries from FICA tax by entering into voluntary salary reduction agreements of the sort involved here, they "could, in effect, control which portion of their compensation was to be included in the social security wage base," a result that "would make the system partially elective and would undermine the FICA tax." S. Rep. 98-23, 98th Cong., 1st Sess. 40 (1983).

As the court of appeals noted (Pet. App. A5), the IRS consistently followed the construction of the statute set forth in Rev. Rul. 65-208 from 1965 until Section 3121(a) was amended in 1983. During that 18-year period, the ruling was not questioned in any reported judicial decision, nor was it challenged in litigation by petitioner or by any other taxpayer. Indeed, petitioner itself "conformed to [Rev. Rul. 65-

208] in making its reports and paying its FICA taxes quarter-annually year after year, including for a significant period after the *Rowan* decision" (Pet. App. A17 (emphasis omitted)). This longstanding administrative construction of the statute, concurred in with apparent unanimity by taxpayers and their advisors nationwide, is entitled to considerable deference.

In 1983, Congress became aware of the possible implications of the *Rowan* decision upon the proper construction of Section 3121. Congress accordingly amended the statute for the explicit purpose of clarifying the law. Social Security Amendments of 1983, Pub. L. No. 98-21, § 324(a)(2) and (3), 97 Stat. 122-123. This amendment was accomplished by adding to the Code a new Section 3121(a)(5)(E), which defines "wages" for FICA purposes to exclude amounts paid under "an annuity contract described in section 403(b), *other than a payment for the purchase of such contract which is made by reason of a salary reduction agreement*" (Pub. L. No. 98-21, § 324(a)(2)(C), 97 Stat. 122 (emphasis added) (now codified in I.R.C. § 3121(a)(5)(E)). The legislative history of this 1983 amendment shows that "Congress saw Rev. Rul. 65-208 as the properly applicable law" during years prior to 1984 and believed that it was "merely codifying the prior law as articulated in Rev. Rul. 65-208" (Pet. App. A6). As the Senate report stated (S. Rep. 98-23, *supra*, at 41):

> The bill also provides that any amounts paid by an employer to a tax-sheltered annuity by reason of a salary reduction agreement between the employer and the employee would be includible in the employee's social security wage base. The committee intended that the provision would

merely codify the holding of Revenue Ruling 65-208.

b. Based upon the IRS's consistent and unchallenged interpretation of the statute over an 18-year period, and upon the legislative history of the 1983 amendment, the court of appeals correctly held (Pet. App. A5-A8) that salary reduction amounts used to purchase tax-sheltered annuities are not "amount[s] paid by an employer for * * * annuities * * * on account of * * * retirement" within the meaning of former Section 3121(a)(2)(A), and hence that such amounts were properly includable in the FICA wage base during the 1979-1982 tax years at issue. And that is so despite this Court's 1981 *Rowan* decision. While the broad reasoning of that opinion "obviously helps the plaintiff here" (Pet. App. A14), that decision did not directly affect the proper construction of Section 3121(a)(2)(A). The holding of *Rowan* was merely that the value of meals and lodging furnished to employees for the convenience of the employer is excludable from the FICA wage base (452 U.S. at 263). In reaching that holding, the Court relied extensively on legislative history, Treasury Regulations, and IRS rulings concerning the historical tax treatment of employer-furnished "supper money," "room and board," and similar items. See 452 U.S. at 257-262. The Court noted that "the Service itself was inconsistent in construing the term 'wages' " in the meals-and-lodging context (*id.* at 261). The Court in *Rowan* had no occasion to consider whether salary reduction amounts used to purchase tax-sheltered retirement annuities constitute "wages" for FICA purposes—such amounts, unlike the meals and lodging at issue in *Rowan*, qualify only for income tax deferral rather than for a permanent income tax exemp-

tion—nor did the Court in *Rowan* have before it the consistent and unchallenged course of administrative construction that is present here.

Even if there were some question whether the court of appeals erred in its construction of now-repealed Section 3121(a)(2)(A), it would not be a question meriting this Court's review. As petitioner appears to concede (Pet. 12-14), there is no conflict among the circuits on the substantive question of tax law presented. To the contrary, the Third Circuit below was the first court of appeals to consider whether salary reduction amounts used to purchase tax-sheltered annuities constitute "wages" for FICA purposes. Every district court that has since considered that question has explicitly followed the decision below. See *University Health Center, Inc.* v. *United States*, 622 F. Supp. 88, 89 (D. Vt. 1985); *Xavier University* v. *United States*, No. C-84-1151 (S.D. Ohio Mar. 7, 1986); *Canisius College* v. *United States*, No. 84-1126E (E.D.N.Y. Mar. 10, 1986); *New England Baptist Hospital* v. *United States*, No. 84-1592-Mc (D. Mass. May 7, 1986). The question presented has no prospective importance, since it cannot arise for any tax year after 1983. There is thus no basis for further review.[2]

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[2] While appearing to concede the absence of a circuit conflict on the substantive question of tax law presented, petitioner urges this Court to resolve an asserted "conflict in the circuits regarding the precedential weight of [IRS] revenue rulings" (Pet. 12). Petitioner notes that revenue rulings represent the official opinion of the IRS and lack the legal force of Treasury Regulations, and asserts that the court of appeals' "unprecedented grant of authority to a revenue ruling creates a direct conflict with other circuits" (Pet. 13). This assertion is doubly flawed. In construing Section 3121(a)(2)(A) as it did, the court of appeals did not rely solely upon the *promulgation* of Rev. Rul. 65-208. The court relied

2. Petitioner also asks this Court to review the court of appeals' alternative holding (Pet. App. A13-A17) that, if the *Rowan* decision were viewed as having changed the law on the question presented, Congress has barred refund claims like petitioner's retroactively, and that this retroactivity does not offend the Due Process Clause. See Pet. i, 16-18. There is, however, no need for the Court to reach the retroactivity question in this case. As we have explained, the court of appeals' construction of unamended Section 3121(a)(2)(A), as to which there is no conflict in the circuits, and which reflects Congress's own view of the pre-1984 law, represents a nonconstitutional ground of decision that is fully adequate to support the judgment below.

In any event, petitioner's constitutional argument is insubstantial. As the court of appeals explained (Pet. App. A10-A11), Congress acted in 1983 to change certain aspects of this Court's decision in *Rowan*. While codifying the Court's narrow holding respecting exclusion of meals and lodging from the

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as well on the facts that the IRS had administered the tax laws for 18 years consistently with the interpretation set forth in that ruling; that the IRS's construction of the statute was shared with apparent unanimity by the Nation's taxpayers and their advisers, including petitioner itself; that Congress in 1983 had explicitly indicated its view that Rev. Rul. 65-208 accurately stated the law under the unamended statute; and that the construction of the statute set forth in Rev. Rul. 65-208 was reasonable on its face, being consistent both with common sense and legislative policy. And even if petitioner could demonstrate some conflict in reasoning or principle as to the weight to be accorded revenue rulings in general, that theoretical disagreement would not indicate that any other circuit would have reached a contrary conclusion with respect to the particular question presented here. Nor would it otherwise represent a conflict among the circuits requiring resolution by this Court. See Sup. Ct. R. 17.1(a).

FICA tax base (Pub. L. No. 98-21, § 327(a)(1), 97 Stat. 126-127 (now codified at I.R.C. § 3121(a)(19)), Congress rejected the Court's broader reasoning that "wages" should generally be construed to mean the same thing for FICA and income-tax-withholding purposes. Pub. L. No. 98-21, § 327(b)(1), 97 Stat. 127 (now codified at I.R.C. § 3121(a) (penultimate sentence)). The latter amendment is commonly called "the *Rowan* decoupling provision" (Pet. App. A9-A10). Both amendments were originally made effective prospectively only, that is, for "remuneration paid after December 31, 1983" (Pub. L. No. 98-21, § 327(d)(1), 97 Stat. 127). Congress's choice of a prospective-only effective date is most naturally explained as reflecting its belief that retroactive application of the 1983 amendments was unnecessary because Rev. Rul. 65-208 accurately stated prior law. See Pet. App. A6-A8, A9 n.3.

In 1984, Congress further evidenced its belief that Rev. Rul. 65-208 accurately stated prior law by amending the effective date of the *Rowan* decoupling provision to ensure that taxpayers did not file refund claims "based on the rationale of *Rowan*, i.e., that 'wages' for FICA purposes are presumptively the same as 'wages' for income tax withholding purposes" (Pet. App. A10). See Deficit Reduction Act of 1984, Pub. L. No. 98-369, § 2662(g), 98 Stat. 1160 (amending Pub. L. No. 98-21, § 327(d), 97 Stat. 127). The 1984 amendment provided that the *Rowan* decoupling provision was to apply to remuneration "paid after March 4, 1983, *and to any such remuneration paid on or before such date which the employer treated as wages when paid*" (Pub. L. No. 98-369, § 2662(g), 98 Stat. 1160 (emphasis added)).

Congress explained this amendment by emphasizing the disruption in the administration of the tax laws, from the viewpoints both of the government and of social security recipients, that negative inferences from the original prospective-only effective date might produce. As the House Report stated (H.R. Rep. 98-432, 98th Cong., 2d Sess. 1658 (1984) (footnote omitted)):

> [I]t is possible that [the prospective-only effective date in the 1983 law] could be cited as demonstrating Congressional intent that the reasoning of the *Rowan* decision should generally apply before these dates to types of remuneration other than meals and lodging * * * e.g., to contributions under a salary reduction agreement to tax-sheltered annuities (sec. 403(b)). These contributions have been held by the Treasury Department to be taxable for FICA purposes (Revenue Ruling 65-208) even though they are exempt by regulation from income tax withholding. If the 1965 revenue ruling were determined to be invalid, then employers and employees would be eligible for tax refunds for open years because taxable wages would be lower. In addition, wages for benefit computation purposes would be reduced, leading in some cases to reduction of social security benefits being paid to current beneficiaries and recoupment of a portion of benefits which have been paid in recent years on the basis of wage records which included the salary reduction contributions.

In order to avoid such erroneous and disruptive inferences, Congress "clarifie[d] the effective date of the provision overriding the *Rowan* decision" so as to preclude refund claims of the sort filed by petitioner here (H.R. Rep. 98-432, *supra*, at 1658).

The court of appeals correctly rejected the contention that petitioner was unconstitutionally subjected to retroactive application of the *Rowan* decoupling provision. To begin with, this Court has often held that a statute which merely clarifies existing law, as Congress stated that the challenged amendments were designed to do, is not "retroactive" at all in the constitutional sense. *Commissioner* v. *Wheeler*, 324 U.S. 542, 545 (1945); *Commissioner* v. *Fisher*, 327 U.S. 512, 514-515 (1946). Even if those amendments were thought to have changed the law retroactively, this Court has repeatedly upheld the retroactive application of income tax laws, both where the period retroactively covered is in the same calendar year as the year of enactment and where it is an earlier calendar year. See, *e.g.*, *United States* v. *Darusmont*, 449 U.S. 292, 296, 297-301 (1981) (per curiam) (citing cases).[3] In order to prevail on a constitutional challenge, a taxpayer must show that the retroactive

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[3] Contrary to petitioner's suggestion (Pet. 17-18 & n.18), this case has virtually nothing in common with *United States* v. *Hemme*, appeal pending, No. 84-1944. That case involves a due process challenge to an allegedly retroactive provision of the federal estate tax laws. The district court in that case had acknowledged that "Congress may provide for the retroactive operation of income tax legislation" (84-1944 J.S. App. 3a) but had held, on the supposed authority of *Untermyer* v. *Anderson*, 276 U.S. 440 (1928), that "the justification for upholding retroactive income tax legislation does not apply to estate and gift tax [laws]" (84-1944 J.S. App. 3a). Although we have demonstrated that the latter proposition is erroneous (84-1944 U.S. Br. 21-24), the fact that the instant case involves the income tax rather than the estate tax removes any need to hold this case pending disposition in *Hemme*, particularly since there exists a fully adequate, independent nonconstitutional ground of decision here.

application of a particular tax "is so harsh and oppressive as to be a denial of due process." *Id.* at 299. Accord, *e.g.*, *Welch* v. *Henry*, 305 U.S. 134, 147 (1938). It is well settled that "[t]he retroactive aspects of legislation * * * meet the test of due process * * * simply [upon a] showing that the retroactive application of the legislation is itself justified by a rational legislative purpose." *Pension Benefit Guaranty Corp.* v. *R.A. Gray & Co.*, 467 U.S. 717, 730 (1984).

Judged by these standards, petitioner's constitutional argument is plainly insubstantial. The challenged 1984 amendment was a "curative" provision (Pet. App. A15) designed to "avert[] the potentially disruptive effect of the *Rowan* decision on the multitude of transactions properly reported by taxpayers in accordance with the applicable rule of law at the time" (*id.* at A17). Indeed, Congress recognized in 1984 that a decision to allow tax refunds of the type sought by petitioner would raise as many retroactivity problems as would a decision to deny such refunds, since the other side of the former coin would be possible "reduction of social security benefits being paid to current beneficiaries and recoupment of a portion of benefits which have been paid in recent years on the basis of wage records which included the salary reduction contributions" (H.R. Rep. 98-432, *supra*, at 1658). Congress surely had a "rational legislative purpose" (*Pension Benefit Guaranty Corp.*, 467 U.S. at 730) in acting to validate a statutory interpretation relied on for 18 years by a multitude of persons, including employers and employees of a wide variety of nonprofit institutions and millions of past, present and future recipients of social security.

Finally, it could not plausibly be contended that retroactive application of the *Rowan* decoupling provision would be "so harsh and oppressive as to be a denial of due process" (*United States* v. *Darusmont*, 449 U.S. at 299). The 1984 change in effective dates imposed no new or unanticipated tax liability upon petitioner. To the contrary, it simply preserved a tax practice that had been universally followed for many years by petitioner and others. In validating that practice, the 1984 amendment did no more than deprive petitioner of the possibility of garnering an undeserved windfall, in the form of potential tax refund claims, from an interpretation of the *Rowan* decision that Congress believed to be incorrect. It would have been far more "harsh and oppressive" if the court of appeals had accepted petitioner's invitation to declare the 1984 amendment unconstitutional, thereby jeopardizing the social security benefits of numerous individuals.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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No. 85-1401

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

TEMPLE UNIVERSITY – OF THE COMMONWEALTH SYSTEM OF HIGHER EDUCATION,

Petitioner.

vs.

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MOTION AND BRIEF FOR JERSEY SHORE MEDICAL CENTER-FITKIN HOSPITAL, AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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MOTION OF JERSEY SHORE MEDICAL CENTER-FITKIN HOSPITAL FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE*

To the Honorable, the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Jersey Shore Medical Center-Fitkin Hospital hereby respectfully moves for leave to file the attached brief *amicus curiae* in this case. The consent of the attorney for the respondent has been obtained. The consent of the attorney for the petitioner was requested but refused.

The interest of Jersey Shore Medical Center-Fitkin Hospital in this case arises from the fact that it is a party to a case presently pending in the United States District Court for the District of New Jersey in which the same issue is before the court, namely, whether the Internal Revenue Service should refund FICA taxes paid on salary reduction amounts used for the purchase of Section 403(b) annuities. [*Jersey Shore Medical Center-Fitkin Hospital, et al. v. U.S.A.* (No. 84-2704-AET)]. Jersey Shore Medical Center-Fitkin Hospital is vitally interested in the instant matter. The Court's decision in this petition will be dispositive of its suit.

In the instant case petitioner does not mention the fiscal impact of the Court's decision. Congress and the majority in the Court of Appeals below were concerned about the financial impact of a taxpayer favorable decision. The brief which *amicus curiae* is requesting to file will discuss this issue.

WHEREFORE, it is respectfully requested that the Court grant movant leave to file the attached brief as *amicus curiae* in this matter.

Respectfully submitted,

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May 27, 1986

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BRIEF FOR JERSEY SHORE MEDICAL CENTER-FITKIN HOSPITAL, AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

INTEREST OF JERSEY SHORE MEDICAL CENTER-FITKIN HOSPITAL

Jersey Shore Medical Center-Fitkin Hospital is a not-for profit corporation that is exempt from Federal income tax but is subject to Social Security ("FICA") taxes.

Jersey Shore Medical Center-Fitkin Hospital is a party to litigation in the United States District Court for the District of New Jersey involving essentially the identical legal question presented by this case. [*Jersey Shore Medical Center-Fitkin Hospital et al. v. U.S.A.* (No. 84-2704-AET)]. Jersey Shore Medical Center-Fitkin Hospital seeks refunds of FICA taxes paid on salary reduction amounts for the purchase of Section 403(b) annuities. In the Jersey Shore Medical Center-Fitkin Hospital situation, as here, the refunds have been denied upon the authority of Revenue Ruling 65-208. The instant petition will be dispositive of Jersey Shore Medical Center-Fitkin Hospital's suit.

SUMMARY OF ARGUMENT

Temple University is entitled to the refunds it seeks because salary reduction contributions used for the purchase of Section 403(b) annuities [Section 403(b) of the Internal Revenue Code of 1954, as amended ("Code"), (26 U.S.C. Section 403(b)] were not wages for FICA [Federal Insurance Contributions Act ("FICA"), 26 U.S.C. Section 3101 *et seq.*] tax purposes when they were paid. The longstanding Congressional intent to exclude these amounts from FICA taxation, the legislative repetition of that intent in 1958 that there be no distinction between salary reduction and salary supplement amounts, the unsupportable adoption of Revenue Ruling 65-208, 1965-2 C.B. 383, and the variance by the Internal Revenue Service ("I.R.S.") in its treatment of "wages" for income tax purposes as opposed to FICA tax purposes compels this result.

The majority below acknowledges that the prospective change in the definition of "wages" [to tax contributions made to Section 403(b) plans funded by amounts paid by virtue of salary reduction agreements] contained in the Social Security Amendments of 1983 [P.L. 98-21, 97 Stat. 122 (1983)] was not made retroactive by the Deficit Reduction Act of 1984, P.L. 98-369, 98 Stat. 494 (1984).

The Court below erred by rewriting the statute to make the 1984 legislation retroactive. To reach its result that the amounts paid prior to the change in the law were taxable, the Court below impermissibly supplied language to the statute that Congress had not.

ARGUMENT

POINT I

THE COURT BELOW ERRED BY FINDING THAT THE 1984 ACT SERVES TO PRECLUDE THE REFUND SOUGHT HERE WHEN THE DEFINITION OF "WAGES" SUBJECT TO FICA TAXATION AT ALL TIMES EXCLUDED PAYMENTS MADE FOR RETIREMENT ANNUITIES AND WAS NOT CHANGED RETROACTIVELY.

Our system of government is based upon the constitutional mandate of separation of powers. That Congress cannot retroactively overrule the Supreme Court is fundamental.

In *Ogden v. Blackledge*, 2 Cranch 272, 277, 2 L.Ed. 276, 278 (U.S. 1804), the Court stated: "[T]o declare what the law is, or has been, is a judicial power; to declare what the law shall be, is legislative. One of the fundamental principles of all our governments is that the legislative power shall be separated from the judicial."

A current Congress cannot retroactively override prior Congressional action and intent when that action and intent is clear and unambiguous, especially where the Supreme Court of the United States has already defined that prior Congressional intent. This Court must reverse the decision below because the majority below has done just that.

During the period at issue, Section 3121(a)(2) of the Code and its predecessor sections excluded payments made to Section 403(b) tax sheltered annuities from taxes under FICA. This evidenced a longstanding Congressional intent to exclude these payments and to encourage retirement savings. This section of the Code was not changed until the Social Security Amendments of 1983, *supra*. The definition of wages was changed *prospectively only*, not retroactively.

It is the government's position that these employer contributions for the purchase of Section 403(b) annuities are not "wages"

for income tax withholding purposes. Revenue Ruling 53-181, 1953-2 C.B. 111, and Revenue Ruling 65-209, 1965-2 C.B. 414. On the other hand, the I.R.S. also takes the position that any salary reduction portion of an employer contribution for the purchase of a Section 403(b) annuity is to be considered "wages" for FICA purposes, while any salary supplement portion is not to be considered "wages" for FICA purposes. Revenue Ruling 65-208, *supra*. This position is contrary to the definition of "wages" in Section 3121 of the Code and clear Congressional intent dating back to 1939.

In *Rowan Companies, Inc. v. Unites States*, 252 U.S. 247 (1981), this Court found that the plain language and legislative history of the enactment of the definition of wages for FICA, FUTA [Federal Unemployment Tax Act ("FUTA"), 26 U.S.C. Section 3301, *et seq.*] and income tax withholding purposes showed that Congress intended that each mean the same thing. The Court stated, at 252 U.S. 257: "[I]t would be extraordinary for a Congress pursuing this interest . . . (of coordinating the income-tax withholding system with FICA and FUTA) . . . to intend, without ever saying so, for identical definitions to be interpreted differently." Rather, "[T]he plain language and legislative histories of the relevant Acts indicate that Congress intended its definition to be interpreted in the same manner to FICA and FUTA as for income-tax withholding."

The instant case closely parallels the situation in *Rowan*. There is no evidence in either the statutes or the legislative history to suggest that Congress intended for there to be a different definition of "wages" for income tax withholding purposes than for FICA purposes within the purview of Section 403(b) of the Code.[1] Further, the Code definitions for "wages" for income tax, FICA and FUTA purposes at all relevant times were almost identical.

In *Rowan*, this Court explicitly stated that the longstanding Congressional policy was that there be no variance between the

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[1] In fact, as set forth *infra*, it is clear that Congress excluded contributions to these plans from the definition of "wages" for FICA purposes.

treatment of "wages" for income tax purposes and the treatment of "wages" for FICA tax purposes. Here, Congress actually changed the intent of prior Congresses going back to 1939. The 1984 legislation is doubly offensive because the 1984 Congress spoke for a prior Congress when no Congress has such power, and its enunciation of that prior Congress' policy was contrary to not only the prior Congressional policy but to the Supreme Court's declaration of what the consistent prior legislative policy had been.

In 1939, Congress provided that amounts used to purchase retirement annuities were to be excluded from FICA taxation [Social Security Act Amendments of 1939, P.L. 76-379, Section 209, 53 Stat. 1360, 1373].

The legislative history shows that Congress wanted no distinction to be made between salary supplement and salary reduction agreements.

Judge Weis stated below at 769 F.2d 126, 136:

> "The House Report articulated the reason for excluding from FICA wages, among other items, payments by an employer to purchase retirement annuities: 'This will save employers time and money but what is more important is that it will eliminate any reluctance on the part of the employer to establish such plans due to the additional tax cost.' H. Rep. No. 728, 76th Cong., 1st Sess. *reprinted in* 1939-2 Cum. Bull. at 543."

The enunciated Congressional purpose in 1939 was to encourage retirement savings by not taxing monies used to purchase retirement annuities.

In Revenue Ruling 53-181, *supra*, the Internal Revenue Service interpreted the law as it applied to charitable institutions.

The statutes as they existed at that time, make clear that monies used to fund annuities were exempt from FICA tax. The I.R.S. followed this in its Revenue Ruling 53-181, *supra*.

Changes to the tax treatment of Section 403(b) plans provided by the 1958 amendments (P.L. 85-866, 72 Stat. 1620-1622), are convincing. The legislative intent shows that there was to be absolutely no distinction between salary supplement and salary reduction funding. The Committee report states:

> "The regulations under present law (sec. 1.403(a)-1(3)) provide that an annuity contract purchased by an exempt organization qualifies provided the purchase of the annuity is 'merely a supplement to past or current compensation.' Among the factors mentioned as to whether an annuity contract is a 'supplement to past or current compensation' is whether the annuity contract is purchased as a result of an agreement for a reduction of the employee's salary or whether it is purchased at his request instead of an increase in current compensation to which he otherwise might be entitled. In such cases the regulations state that the amount paid for the contract is to be considered current compensation. Your committee intends the objective 20 percent rule set forth above as a complete substitute for these rules in the regulations. . . ."

Senate Report No. 1983, 85th Cong., 2nd Sess., *reprinted in* U.S. Code Cong. & Ad. News, 1958, Vol. 3 pp 4824-4825.

Up to this point, and reaffirmed by the 1958 legislative history, there was no distinction between salary reduction and salary supplements used to fund retirement annuities.

Unlike other types of retirement plans, Section 403(b) plans can only be funded by annuities - there is a strong interplay between Section 403(b) and Section 3121 of the Code.

In 1965, Revenue Ruling 65-208, *supra*, was promulgated. The Revenue Ruling did not validly reflect the plain language, origin or purpose of the definition of wages in Section 3121(a) of the

Code.[2] The government has justified neither its basis in law nor its authority for the adoption of Revenue Ruling 65-208.[3]

In *Canisius College v. United States of America* [Slip Opinion, February 28, 1986, Hon. John T. Elfvin, W.D.N.Y., appeal docketed, United States Court of Appeals for the Second Circuit, No. 86-6065 (reproduced in appendix hereto)], the Court found that "[O]nly upon the emergence of concern for the stability of the FICA wage base was this contrary ruling promulgated. . . . This Court agrees that it is inappropriate to attempt to legitimatize Revenue Ruling 65-208 based upon the financial state of the national system of social insurance in 1965, 1983 or 1984 or upon Congress' 1983 and 1984 debates, reports and enactments

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[2] The Revenue Ruling is contrary to Treasury Regulation 31.3121(a)(2)-(1)(d), 26 C.F.R. Section 31.3121(a)(2)-(1)(d) providing:

> "It is immaterial for purposes of this exclusion whether the amount or possibility of such benefit payments is taken into consideration in taxing the amount of an employee's remuneration or whether such payments are required, expressly or impliedly, by the contract of service."

[3] The legislative history of the 1983 legislation shows that Congress considered that these amounts were not taxable.

The Conference Report of the Social Security Amendments of 1983 acknowledged that the "*present law*" (as of March 4, 1983) provided that these contributions were FICA tax exempt. The report states:

> "Subject to certain limitations, amounts paid by the employer for the purchase of a tax-sheltered annuity for an eligible employee *are excluded from the employee's taxable income and social security wage base*. Tax-sheltered annuities may be purchased for employees of educational institutions and certain tax-exempt organizations. Tax-sheltered annuities may be purchased pursuant to a salary reduction agreement." (Emphasis added). (House-Conference Rep. No. 98-47, 98th Cong., 1st Sess. 146 (1983), *reprinted in* U.S. Code Cong. & Ad. News., May 1983, Vol. 2, p. 436.)

amending the relevant law. It is therefore found that Revenue Ruling 65-208 did not validly reflect the plain language, origin or purpose of Section 3121(a)." [Slip opinion at p. 5][*]

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[*] The *Temple* decision also expresses unnecessary concern over the impact of a taxpayer favorable decision to the Social Security system. The experience of *Rowan* refunds is instructive in this regard. Initially, the I.R.S. had estimated that refunds in excess of $2 billion would result from the *Rowan* decision. The I.R.S. later announced that it had agreed to $91 million in refunds plus interest and that claims from 230,000 employers had been received. It then forecast a total of claims from 500,000 employers that would bring the amount of refunds to $285 million plus interest. (See December 15, 1982, *The Wall Street Journal*, p. 1, col. 5) Similarly, in the instant matter the dollar impact alluded to by the majority herein is not as significant as might first appear. Upon information and belief, less than 100 employers have filed suits for these refunds. The Statute of Limitations for 1982 claims expired on April 15, 1986. Congress has barred claims for refunds after 1983. Upon information and belief, approximately $50 million of refund claims are at stake. This is significantly less than the $1 to $2 billion which was potentially refundable.

POINT II

CONGRESS VIOLATED THE CONSTITUTION BY RETROACTIVELY OVERRULING THE *ROWAN* DECISION AND BY RETROACTIVELY CHANGING EARLIER LEGISLATIVE POLICY.

The government's reliance upon the 1983 and 1984 legislation to preclude the refunds herein is unsupportable.

Congress did two things in the 1983 Social Security Amendments: First, it changed the definition of wages subject to FICA tax to include retirement plans and contributions funded through salary reduction agreements in the FICA wage base. P.L. 98-21, Section 324(a)(2), adding 26 U.S.C. 3121(a)(5)(E), now 26 U.S.C. 3121(a)(5)(D); second, in direct response to the variance in the definition of wages found prohibitive by *Rowan*, Section 328(b)(1) of the Amendments added language which allowed the I.R.S. to interpret "wages" for income tax purposes differently from wages for FICA purposes (the "Rowan decoupler").

The Deficit Reduction Act of 1984, P.L. 98-369, Section 2662(g), 98 Stat. 494, 1160, amended the 1983 Act by changing the effective date of the *Rowan* decoupling provision to "apply to remuneration . . . paid after March 4, 1983, and to any such remuneration paid on or before such date which the employer treated as wages when paid."

It is not disputed, nor can it be, that the change in the definition of "wages" contained in the 1983 Amendments was *not* made retroactive by the 1984 Congress. Yet the Court below reached its result as if it had been.

This is not so much a matter of retroactive taxation as it is of a retroactive change in a longstanding legislative policy, which policy was unambiguous and which was repeated by this Court in *Rowan*. This is a case of a 1984 Congress attempting to speak

for several prior Congresses and saying that the 1965 Revenue Ruling comported with prior law, when, in actuality, it did not and was the exact opposite of prior law.

This action by Congress is not permissible curative legislation. (See Justice White's dissent in the denial of certiorari in *Van Emmerik v. Janklow*, 454 U.S. 1131, 1132, 102 S.Ct. 986, 987, 71 L.Ed. 2d 285, 286 (1982), quoting *United States v. Heinszen & Co.*, 206 U.S. 370, 374, ". . .the legislature may 'cure irregularities, and confirm proceedings which without the confirmation would be void, because unauthorized, provided such confirmation does not interfere with intervening rights'.")

Here, however, there has been an impermissible retroactive change in a legislative policy dating back to 1939.

The action of the 1939 Congress was clear, the 1984 Congress cannot *retroactively* change longstanding contrary Congressional policy.

Rowan teaches that absent Congressional intent to the contrary, there cannot be a difference in the treatment of the definition of wages for FICA purposes. There was no change in the 1939 Congressional intent to exclude these contributions from FICA taxation until the 1983 Social Security Amendments. The 1939 statute is controlling for the period at issue. Here, the 1984 Congress attempted to reach back to 1939 to not supply, but rather change, the intent to exclude these amounts from FICA taxation. This cannot be done.

CONCLUSION

The decision below was reached by the majority notwithstanding the longstanding Congressional intent to exclude these amounts from FICA taxation, and that there be no distinction between salary reduction and salary supplement amounts. The unsupportable adoption of Revenue Ruling 65-208; the impermissible variance by the I.R.S. in its treatment of "wages" for income tax purposes as opposed to FICA tax purposes; and the retroactive overruling of the *Rowan* decision; together with the number of pending suits involving the same issue, necessitates resolution by this Court.

The Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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May 27, 1986

APPENDIX A

APPENDIX A

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

CANISIUS COLLEGE,

Plaintiff,

—vs—

UNITED STATES OF AMERICA,

Defendant.

CIV-84-1126E

MEMORANDUM and ORDER

The plaintiff ("Canisius") seeks a refund of Federal Insurance Contribution Act ("FICA") contributions made in 1980 and the defendant has moved and the plaintiff has cross moved for summary judgment.

The facts are not in dispute. Canisius is a non-profit educational institution exempt from federal income tax pursuant to section 501(c)(3) of the Internal Revenue Code. In 1980 Canisius had in effect an employee retirement annuity plan of a type described in 26 U.S.C. §403(b). Under such plan certain employees agreed to accept wage reductions in exchange for Canisius's purchase of annuity contracts on their behalves. Pursuant to section 403(b), the cost or value of the contracts was excludable from the employees' 1980 gross income for federal withholding tax purposes. No question appears to exist concerning Canisius's eligibility to develop or implement such a plan or concerning the propriety of excluding the cost or value of the annuities from the participating employees' gross income for federal income tax withholding purposes.

In contrast to the treatment of such employer contributions for income tax purposes, the amounts used to purchase annuities had been declared in Revenue Ruling 65-208, 1965-2 Cum. Bull. 383, to be includable in the FICA wage base. In compliance with such ruling, Canisius withheld taxes from its employees' wages based upon such inclusion. Canisius also paid the corresponding FICA taxes imposed on it as an employer as measured by the FICA taxable wage bases of its employees.

In 1981 the United States Supreme Court decided *Rowan Cos. v. United States* ("*Rowan*"), 452 U.S. 247, which held that "wages" must be consistently interpreted for federal income withholding and for FICA purposes. *Id.* at 263.

In light of such holding, Canisius sought the refund of employer and employee FICA taxes for the 1980 tax year together with statutory interest on behalf of itself and a number of its employees who had participated in the salary reduction annuity plan. In a letter dated April 30, 1984 the Director of the Massachusetts Service Center of the Internal Revenue Service notified Canisius that the refund request had been disallowed in full based upon Revenue Ruling 65-208.

Canisius alleges in this action that "wages" subject to FICA taxation, despite Revenue Ruling 65-208, at all times excluded the payments made for retirement annuities. 26 U.S.C. §3121(a), promulgated in 1939, defines "wages" subject to FICA taxes. That subsection, as it existed during the 1980 tax year at issue in this action, included as wages

> "all remuneration for employment, including the cash value of all remuneration (including benefits) paid in any medium other than cash ***."

The statute excluded from the definition of wages

> "the amount of any payment (including the amount paid by an employer for insurance or annuities, or into a fund, to provide for any such payment) made to, or on behalf of, an employee or any of his dependents

> under a plan or system established by an employer which makes provision for his employees generally *** on account of – (A) retirement ***." 26 U.S.C. §3121(a)(2).

The definition of wages for federal income tax withholding purposes is almost identical to that used to define wages for FICA purposes. *See Rowan, supra,* at 255. Section 403(b), using language very similar to that used in subsection 3121(a)(2), provides the basis for excluding under particular circumstances the value of an employer purchased annuity from an employee's federal income tax wage base.[1] Section 403(b) has been held to exclude from the federal income tax wage base both amounts contributed by an employer in addition to an employee's regular salary and amounts contributed in lieu of the employee's salary pursuant to a salary reduction plan. *See Temple University v. United States*, 769 F.2d 126, 133 (3rd Cir. 1985). Despite the similarity between sections 403(b) and 3121(a)(2), Revenue Ruling 65-208 held that the latter excluded from the FICA wage base only salary supplements used to purchase retirement annuities and not salary reduction amounts used to purchase such annuities.

As in the court of appeals decision in *Rowan* it is possible to rationalize the disparate treatment given salary reduction and retirement annuity purchase plans under the federal withholding and FICA schemes if one looks to the different purposes of FICA and federal income tax. A lesson of *Rowan*, however, is that, absent express congressional intent to the contrary, the term wages is to be interpreted in the same manner for FICA purposes as for income tax withholding purposes. Nevertheless and despite

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[1] Section 403(b) provided that, if an annuity contract is purchased for an employee by an employer described in section 501(c)(3) which is exempt from tax under secton 501(a) and the employee's rights under the contract are nonforfeitable except for failure to pay future premiums, then amounts contributed by such employer for such annuity contract on or after such rights become nonforfeitable shall be excluded from the gross income of the employee for the taxable year to the extent that the aggregate of such amounts does not exceed the exclusion allowance for such taxable year.

the language used in *Rowan*, the present action may be distinguished on the basis that the federal income tax statute at issue in *Rowan* excluded certain income from taxable wages and it was found that such exclusion was reflected in the FICA wage base calculation. Here, the federal income tax statute involved merely defers federal income tax liability and such deferment cannot be reflected under the present FICA scheme. The definition of FICA wages, unlike the federal income tax withholding definition of wages, does not include the value of annuity disbursements. This Court finds, however, that it is not called upon to decide whether the holding in *Rowan* requires that the definition of wages applied in deferring taxes on income produced by an employer's purchase of annuities must be applied to the definition of FICA wages.

In *Rowan* the question was the validity of a Treasury regulation. In the case at bar, this Court must initially focus on the validity of a revenue ruling. Although a Treasury regulation merits greater deference from a court, a revenue ruling is entitled to substantial deference and has "the force of legal precedents unless unreasonable or inconsistent with the provisions of the Internal Revenue Code." *Dunn v. United States*, 468 F.Supp. 991, 993 (S.D.N.Y. 1979). In evaluating the reasonableness of a regulaton or ruling, a court must determine whether it "harmonizes with the plain language of the statute, its origin, and its purpose." *See Rowan, supra*, at 253, *quoting from National Muffler Dealers Assn. v. United States*, 440 U.S. 472, 477 (1979).

The plain language of section 3121(a)(2) made no distinction between wage supplement and wage reduction amounts used by an employer to purchase annuities on account of an employee's retirement. As is noted in Judge Weis's dissent in *Temple University v. United States, supra* at 126, 136-137, the legislative history of the section and the administrative application of the section demonstrate that no distinction had been made between supplemental and reduction amounts until 1965. Only upon the emergence of concern for the stability of the FICA wage base was this contrary ruling promulgated. Although the ruling has been consistently interpreted since its publication, that consistency

and Congressional reliance upon its validity do not themselves serve to justify its unreasonable interpretation of the statute. This Court agrees that it is inappropriate to attempt to legitimatize Revenue Ruling 65-208 based upon the financial state of the national system of social insurance in 1965, 1983 or 1984 or upon Congress's 1983 and 1984 debates, reports and enactments amending the relevant law. It is therefore found that Revenue Ruling 65-208 did not validly reflect the plain language, origin or purpose of section 3121(a).

In 1983, however, apparently spurred by the decision in *Rowan*, Congress enacted the Social Security Amendments Act of 1983, ("the 1983 Act"), Pub.L. No. 98-21, 97 Stat. 65. The 1983 Act made two relevant changes to section 3121(a). It deleted the reference to "retirement" plans in the list of exclusions from the FICA wage base in the section and added subsection 3121(a)(5)(E)[2] which excludes from the FICA wage base any employer payment

> "under or to an annuity contract described in section 403(b), other than a payment for the purchase of such contract which is made by reason of a salary reduction agreement ***."

The 1983 Act, in effect, codified Revenue Ruling 65-208. Section 327(b) of the 1983 Act also added, after what is now 26 U.S.C. §3121(a)(20), a sentence which states that:

> "Nothing in the regulations prescribed for purposes of chapter 24 (relating to income tax withholding) which provides an exclusion from 'wages' as used in such chapter shall be construed to require a similar exclusion from 'wages' in the regulations prescribed for purposes of this chapter."

The sentence appears to serve to counteract the *Rowan* decision by expressly decoupling the FICA and federal withholding tax definitions of wages.

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[2] Now codified as 26 U.S.C. §3121(a)(5)(D).

The 1983 Act leaves no doubt that the type of claim presently before this Court was to be foreclosed. The amendments went into effect on January 1, 1984 and thus do not, by themselves, apply to Canisius's claim that FICA taxes paid in 1980 should be refunded.

In the Deficit Reduction Act of 1984 ("the 1984 Act"), Pub.L. No. 98-369, 98 Stat. 494, Congress changed the effective date of section 327(b) of the 1983 Act. It made the FICA and federal income tax wage definition decoupling provision applicable to

> "remuneration *** paid after March 4, 1983, and to any such remuneration paid on or before such date which the employer treated as wages when paid." *Id.*, §2662(g).

The 1984 Act, however, did not expressly provide that the 1983 amendments to section 3121(a)'s definitions of wages were to be applied retroactively.

As noted in *Temple University v. United States, supra*, the legislative history of the 1984 Act reveals that it clearly had been Congress's purpose to foreclose the granting of refunds in cases such as the one presently before this Court. Despite the fact that the 1984 Act failed to make the 1983 Act's definition of the FICA wage base under section 3121(a) expressly retroactive to 1980, this Court finds that it serves to preclude the refund sought here. *Id.* at 132-133. The 1984 Act, therefore, had the effect of making the value or cost of employer purchased retirement annuities in this action taxable as part of an employee's FICA wage base.

Canisius alleges that the retroactive effect of the 1983 Act and the 1984 Act unconstitutionally overruled *Rowan*. That case however, did not, as Canisius contends, invalidate Revenue Ruling 65-208. As noted above, even after *Rowan*, a substantial question remained whether the reasoning in that decision provided a basis upon which to invalidate the distinction made between sections 403(b) and 3121(a)(2). In 1983 and 1984, Congress acted to codify the distinction before the question was answered. The amendments, therefore, did not unconstitutionally overrule *Rowan*.

Canisius also claims that the retroactive force of the 1983 Act and the 1984 Act violate the due process clause of the Fifth Amendment. As it notes, the United States Supreme Court has states that in cases such as this one "it is necessary to consider the nature of the tax and the circumstances in which it was laid before it can be said that its retroactive application is so harsh and oppressive as to transgress the constitutional limitation." *Welch v. Henry*, 305 U.S. 134, 147 (1938). Neither the highest court nor any intermediate federal court has adopted an absolute time limit on retroactivity. *Temple University v. United States*, *supra* at 135. Instead, a test for determining whether the retroactive application is so harsh, arbitrary or unfair so as to violate due process rights is "whether this taxpayer has had its expectations as to taxation unreasonably disappointed." *Wilgard Realty Co. v. Commissioner of Internal Rev.*, 127 F.2d 514, 517 (2d Cir., 1942). It was additionally noted therein that "retroactive taxation is not so arbitrary and oppressive as to be unconstitutional if it is no more burdensome than the taxpayer should have expected it to be when he did the thing which created the tax liablility" and that "when it is not, whether the period of retroactivity is comparatively long or short is of little consequence provided it isn't too long to be within reason." *Ibid.* The standard of oppressiveness is thus one of degree.

The five-year retroactive period in this case is relatively long. *See Welch v. Henry, supra; United States v. Hudson*, 299 U.S. 498, 501 (1937); *Purvis v. United States*, 501 F.2d 311 (9th Cir. 1974), *cert. denied* 420 U.S. 947 (1975); *Wilgard Realty Co. v. Commissioner of Internal Rev., supra.* A number of other factors convince this Court, however, that Canisius's due process rights had not been violated. Revenue Ruling 65-208 had been consistently applied since its publication in 1965 to include salary reduction amounts as wages and Canisius had complied with that ruling's interpretation of section 3121(a)(2) through the 1980 tax year. Its expectations would reasonably include the continued validity of the ruling. The decision in *Rowan*, while perhaps marginally changing Canisius's expectations, did not provide it with any certain right to a FICA tax refund. In addition, the 1983 Act and the 1984 Act were merely curative in the sense that

they sought to foreclose the possibility that *Rowan* would affect the rationale and effectiveness of Revenue Ruling 65-208. These factors persuade this court that the retroactive legislation did not unreasonably disappoint Canisius's expectations as to its FICA tax liability. The legislation, therefore, was not so oppressive so as to violate its due process rights.

Accordingly, it is hereby ORDERED that Canisius's motion for summary judgment is denied and that the defendant's motion for summary judgment is granted.

Dated: Buffalo, N.Y.
February 28, 1986

s/ John T. Elfvin
U.S.D.J.